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Governing Xenophobia

E. Tendayi Achiume

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Governing Xenophobia

*E. Tendayi Achiume**

ABSTRACT

The problem of xenophobia has gained remarkable notoriety of late, and reports from around the world paint a chilling picture of its virulence, especially where refugees and other involuntary migrants are concerned. How should one understand this global picture of xenophobic contestation and its fallout, and specifically, how should one understand international law's relationship to both?

The first contribution of this Article is to introduce an emerging global framework intended by states and other international actors to improve global cooperation to combat the problem of xenophobia. This global anti-xenophobia framework (the Framework) is rooted in international human rights law and in the global involuntary migration governance regime, which includes international refugee law and will soon include the Global Compacts on Migration and on Refugees. This Article traces the historical development of the Framework, outlines its architecture, and assesses the key debates among states regarding the

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status of global norms on xenophobia. Doing so illuminates the evolving normative, doctrinal, and institutional commitments of the Framework.

The second contribution of this Article is to identify an untenable blind spot in the emerging Framework, which ignores various ways that features of the global governance of involuntary migration make the problem of xenophobia worse. This Article argues that the global involuntary migration governance regime has built-in gaps and incentive structures that increase opposition—including xenophobic opposition—to the admission and inclusion of involuntary migrants. The Article thus lays out how specific features of international law and policy on involuntary migration are themselves seemingly part of the problem of xenophobia.

The final contribution of this Article is to offer concrete recommendations for how the Framework could be supplemented to include attention to the counterproductive effects that governance structures and state activity within them contribute to the problem of xenophobia.

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I. INTRODUCTION

Existing global frameworks governing the movement of people across international borders are ill-suited to such movement.¹ This Article specifically focuses on the manner in which these frameworks can heighten problems they should not, make dangerous journeys worse, and exacerbate conflict regarding where people go and their fate on arrival. This Article examines this counterintuitive dynamic in the context of large-scale contemporary involuntary migration² and the growing problem of xenophobia that accompanies it.

1. In 2017, the American Journal of International Law Unbound published a three-part symposium with essays by migration experts all beginning from the premise that “international migration law needs to be radically redesigned.” See generally Jaya Ramji-Nogales & Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AM. J. INT’L L. UNBOUND 134 (2017). These essays provide a good introduction to some of the most pressing shortcomings of existing frameworks. *Id.*

2. The United Nations Migration Agency (IOM) defines a migrant as “any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.” *Who is a Migrant?*, INTERNATIONAL ORGANIZATION FOR MIGRATION (2018), <https://www.iom.int/who-is-a-migrant> (last visited Jan. 19, 2018) [<https://perma.cc/639V-PLZJ>] (archived Jan. 19, 2018). I use the term involuntary migration to refer to the coerced movement of persons, and while this coerced movement may remain internal to one’s country of nationality, my focus is coerced movement that drives persons across international borders. The movement of involuntary migrants may be coerced by persecution, conflict, natural or climate change-related disasters and extreme economic hardship. As a result, involuntary migrants may be refugees but the category extends to include coerced movement that is not legally protected by international law. Under international law a refugee is a person who is outside her country of nationality owing to a well-founded fear of persecution on account of race, nationality, political opinion, religion, or membership in a particular social group, and who due to that fear will not avail herself of that country’s protection. G.A. Res. 429 (V), art. 1, § A(2), Convention Relating to the Status of Refugees (June 28, 1951). Throughout this Article I use the term “refugee” in its international legal sense.

Between mid-2015 and mid-2016, over 1 million involuntary migrants including Syrian refugees sought refuge in Europe.³ Many European states responded with vitriolic anti-migrant policies.⁴ For example, at Hungary's border, Syrian refugees and other involuntary migrants faced brutal beatings, razor-sharp fences, and other tactics to prevent their entry.⁵ A member of Hungary's government publicly remarked that hanging pigs' heads at that country's border might effectively deter arrival of Muslim refugees.⁶ In this period Hungary's President described migration as "poison," adding that "every single migrant poses a public security and terror risk."⁷ Following the United Kingdom's referendum to exit the European Union, xenophobic speech and violence saw a sharp rise in that country.⁸ And despite the geographic remoteness of the United States from the events in Europe,

3. See *Operational Portal: Refugee Situations*, UN REFUGEE AGENCY, <http://data.unhcr.org/mediterranean/regional.php> (last visited Jan. 19, 2018) [<https://perma.cc/N7BS-XD3G>] (archived Jan. 19, 2018).

4. See *Big, Bad Visegrad*, THE ECONOMIST (Jan. 26, 2016), <https://www.economist.com/news/europe/21689629-migration-crisis-has-given-unsettling-new-direction-old-alliance-big-bad-visegrad> [<https://perma.cc/2ZHC-8MRR>] (archived Jan. 19, 2018) (describing the xenophobic response of the Visegrad, and the rise of xenophobic political parties across Europe). Some did not. The leading example of a state that took measure to admit and include Syrian refugees as many others took an opposing stance, is Germany. See Allan Hall & John Lichfield, *Germany Opens Its Gates: Berlins Says All Syrian Asylum-Seekers are Welcome to Remain, as Britain is Urged to Make a 'Similar Statement'*, INDEPENDENT (Aug. 24, 2015, 7:25 BST), <http://www.independent.co.uk/news/world/europe/germany-opens-its-gates-berlin-says-all-syrian-asylum-seekers-are-welcome-to-remain-as-britain-is-10470062.html> [<https://perma.cc/SFZ8-2DFK>] (archived Jan. 19, 2018) (describing the new open door policy in Berlin, Germany).

5. See Associated Press, *Refugees Being Severely Abused by Hungarian Authorities, Report Alleges*, CBCNEWS (Jul. 13, 2016, 12:49 AM), <http://www.cbc.ca/news/world/hungary-serbia-border-refugees-beatings-violence-human-rights-watch-1.3676608> [<https://perma.cc/7N67-XV5J>] (archived Jan. 19, 2018) ("Hungarian police and soldiers have beaten some refugees severely before sending them back across the border to Serbia.").

6. Nick Squires, *Hungarian Politician Suggests Hanging Pigs' Heads Along Border to Deter Muslim Refugees*, THE TELEGRAPH (Aug. 22, 2016, 12:27 PM), <http://www.telegraph.co.uk/news/2016/08/22/hungarian-politician-suggests-hanging-pigs-heads-along-border-to/> [<https://perma.cc/8KK7-3RT3>] (archived Jan. 19, 2018).

7. *Hungarian Prime Minister Says Migrants Are 'Poison' and 'Not Needed'*, THE GUARDIAN (Jul. 26, 2016, 8:13 PM), <https://www.theguardian.com/world/2016/jul/26/hungarian-prime-minister-viktor-orban-praises-donald-trump> [<https://perma.cc/3253-A2QM>] (archived Jan. 19, 2018).

8. See *Brexit Vote Has Led to Noticeable Rise in UK Xenophobia, Watchdog Warns*, INDEPENDENT (OCT. 4, 2016, 12:22 AM), <http://www.independent.co.uk/news/uk/home-news/brexit-vote-has-led-to-noticeable-rise-in-uk-xenophobia-watchdog-warns-a7343646.html> [<https://perma.cc/9H4X-JJDK>] (archived Jan. 18, 2018) ("[T]he Brexit referendum seems to have led to a further rise in 'anti-foreigner' sentiment.").

xenophobic backlash nonetheless escalated here, too. In his presidential campaign, Donald Trump espoused an explicit anti-Muslim, Islamophobic rhetoric, which characterized Islam and its adherents as per se threats to the United States. Among his campaign promises was a “total and complete shutdown” of Muslims entering the United States.⁹ And during this campaign and following his election, reports documented a spike in prejudice-motivated crimes against Muslims in the United States,¹⁰ while governors, mayors, and members of Congress

9. Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States,'* WASHINGTON POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.c2967a81a5f1 [<https://perma.cc/5XSY-TV79>] (archived Jan. 19, 2018).

10. See Rob Crilly, *Anti-Muslim Hate Groups on the Rise in the US*, THE NATIONAL (March 2, 2017, 4:00 AM), <http://www.thenational.ae/world/americas/anti-muslim-hate-groups-on-the-rise-in-the-us> [<https://perma.cc/5JYW-SF2V>] (archived Jan. 19, 2018) (“more than 100 organisations are showing open hostility to Muslims . . . the most important factor has been the Trump campaign”); Carol Kuruvilla, *Anti-Muslim Hate Crimes Are Spiking in the U.S. Donald Trump Won't Speak Up*, HUFFINGTON POST (Feb. 25, 2017, 12:21 PM), http://www.huffingtonpost.com/entry/trump-islamophobia-anti-semitism_us_58b08debe4b0780bac2938b4 [<https://perma.cc/9D8W-H658>] (archived Jan. 19, 2018) (“Since Trump entered the White House, mosques have been vandalized and even set on fire, a prominent Muslim civil rights leader has been threatened with physical assault, and Muslim university students have been targeted with racist fliers and propaganda.”); Alexis Okeowo, *Hate on the Rise After Trump's Election*, NEW YORKER (Nov. 17, 2016), <http://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election> [<https://perma.cc/T62W-ZH56>] (archived Jan. 19, 2018) (saying there has been a “spike in harassment, a spike in vandalism, physical assaults” in the seven days since Trump’s election). The escalation of Islamophobia under the Trump Presidency is part of a larger resurgence of white supremacist ideology—Lauren Meltzer & Tony Dokoupil, *Hate Rising: White Supremacy's Rise in the U.S.*, CBS NEWS (Aug. 21, 2017, 5:57 PM), <https://www.cbsnews.com/news/hate-rising-cbsn-on-assignment/> [<https://perma.cc/GSJ9-25SR>] (archived Jan. 19, 2018)—that has enjoyed the support of President Trump. See, e.g., Glenn Thrush & Maggie Haberman, *Trump Is Criticized for Not Calling Out White Supremacists*, N.Y. TIMES (Aug. 13, 2017), <https://www.ny-times.com/2017/08/12/us/trump-charlottesville-protest-nationalist-riot.html?mcubz=3> (subscription required) [<https://perma.cc/7G7M-CCKU>] (archived Jan. 19, 2018).

called for blanket exclusion of refugees from Syria, alleging urgent national security concerns.¹¹ This is but a snapshot of a problem of global prevalence.¹²

At present, there is no consensus definition of xenophobia or xenophobic discrimination in international law. For the purposes of this Article, “xenophobia” refers to a certain class of illegitimate anti-foreigner attitudes and actions that should be understood as political in fundamental respects.¹³ A later Part details the prevailing ambiguity

11. In his first week in office, President Trump went on to sign an Executive Order that banned entry to the United States: (1) indefinitely for all nationals of seven Muslim-majority countries; (2) indefinitely for Syrian refugees approved for resettlement; and (3) for a period of ninety days for all other refugees approved for resettlement. *See generally* Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977-8982 (Feb. 1, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-02-01/pdf/2017-02281.pdf> (last visited Jan. 19, 2018) [<https://perma.cc/J8UJ-TLQ4>] (archived Jan. 19, 2018) [hereinafter “Executive Order”]. The Trump administration later amended this Executive Order numerous times over the course of litigation challenging its legality.

12. *See* Human Rights Council, Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/HRC/32/50, ¶¶ 36–67 (2016) (describing manifestations of xenophobia in Africa, the Americas, the Asia-Pacific Region, the Middle East and North Africa, and Europe). At the end of 2016, Dictionary.com celebrated the word “xenophobia” as its word of the year due to worldwide user interest in the word, signaled by the pervasiveness of the term in the service’s lookup data. *Dictionary.com’s 2016 Word of the Year: Xenophobia*, DICTIONARY.COM (Nov. 28, 2016), <http://blog.dictionary.com/xenophobia/> [<https://perma.cc/KB7C-JMKU>] (archived Jan. 19, 2018). This Article focuses on *global* resistance to involuntary migrants in the sense that such migrant resistance is widely distributed across the globe. *Id.* As a matter of record, this resistance has occurred alongside competing popular protest in support of involuntary migrant inclusion. One example is the Refugees Welcome movement mobilizing private citizens across Europe to provide accommodation and other support to involuntary migrants. REFUGEES WELCOME, <http://www.refugees-welcome.net/> (last visited Jan. 19, 2018) [<https://perma.cc/JEE5-CNPP>] (archived Jan. 19, 2018).

13. A dictionary definition of xenophobia highlights its psychological dimension—irrational fear or dislike of foreigners. *Xenophobia*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/xenophobia> (last visited Jan. 19, 2018) [<https://perma.cc/C9ES-HQK3>] (archived Jan. 19, 2019). The psychological dimensions of xenophobia ought not to eclipse its political dimensions. Political here means fundamentally implicating the constitution, boundaries, and beneficiaries of the nation-state. Xenophobia involves policing of the demarcation between “deserving” natives and “undeserving” foreigners, and contestation of the validity of foreigners’ physical presence in a given territory or the legitimacy of their enjoyment of the perceived benefits of citizenship. This political conception of xenophobia resonates with that advanced by David Haekwon Kim and Ronald R. Sundstrom who have usefully theorized xenophobia as “civic ostracism.” David Haekwon Kim & Ronald R. Sundstrom, *Xenophobia and Racism*, 2(1) CRITICAL PHILOSOPHY OF RACE 21, 24 (2014). On this view, xenophobia concerns the “ethical relations of the polity,” *id.* at 23, and characterizing xenophobia as civic ostracism centers “on the notion that inclusion in the civic mainstream is a precondition for certain social goods (including officially recognized and sanctioned social relations) and is itself a good, and thus its denial through ostracism, whether intentional or neglectful,

at the international level as to precisely how this class of illegitimate attitudes and action is delineated. But at this early stage it is sufficient to describe xenophobic attitudes and actions as those that have the purpose or effect of racialized exclusion of non-nationals.¹⁴ Although shifts in global involuntary displacement have reinvigorated scholarly attempts to conceptualize different facets of global migration governance,¹⁵ little exists on the specific question of xenophobia.¹⁶ This Article addresses this gap.

The first contribution of this Article is to describe an emerging global framework intended by its authors to improve international cooperation to combat the problem of xenophobia (the Framework).¹⁷ Recent developments in this emerging Framework include a UN Human Rights Council Resolution initiating the drafting of new international law criminalizing acts of a xenophobic nature. In parallel, states and other international actors are engaged in a separate process intended to revamp the global governance of involuntary migration through two new global agreements: a Global Compact for Refugees, and a Global Compact on Migration. In this context, the United Nations Secretary-General has initiated “a global campaign led by the United Nations to counter xenophobia”¹⁸ as a fundamental feature of an international regime capable of addressing large movements of migrants and refugees. In the New York Declaration for Refugees and Migrants (New York Declaration) adopted in September 2016, UN member states condemned xenophobia and committed to implementation of the global

is morally condemnable.” *Id.* at 24. Typical conceptions of xenophobia and xenophobic discrimination spotlight explicit anti-foreigner prejudice as a defining characteristic, but I have argued elsewhere for the need for a structural conception of xenophobic discrimination, attentive to xenophobic harm that can occur absent explicit anti-foreigner prejudice. E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 GEO. J. INT’L L. 323 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294557 [<https://perma.cc/P9Z9-DN7B>] (archived Jan. 19, 2018) (conceptualizing structural xenophobic discrimination and arguing that certain forms of it are prohibited by international human rights law).

14. See *infra* Part I(a) and II(a).

15. See generally AMERICAN SOCIETY OF INTERNATIONAL LAW, CHARTING NEW FRONTIERS IN INTERNATIONAL LAW (110th ASIL Annual Meeting ed. 2016) (convening session of migration experts to discuss the canon of international migration law); VINCENT CHETAIL, INTERNATIONAL MIGRATION LAW (Oxford Univ. Press 2014) (providing a comprehensive historical and doctrinal study of international migration law).

16. One exception is Achiume, *supra* note 13.

17. I refer to this interchangeably as “the global anti-xenophobia framework” or “the Framework.”

18. U.N. Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, ¶ 61, U.N. Doc. A/70/59 (Apr. 21, 2016).

anti-xenophobia campaign.¹⁹ This Article situates these developments in a broader trajectory of global cooperation to combat xenophobia and its manifestations to sketch, for the first time, the apparatus of the nascent Framework. This Article also identifies and assesses the key debates among states, occurring within the Framework regarding xenophobia under international law. Understanding the emerging normative, doctrinal, and institutional commitments of this Framework is vital, not least because this Framework may well be a prototype or precursor to a full-fledged global anti-xenophobia regime.

The second contribution of this Article is to bring to light a dangerous blind spot in the emerging Framework that ignores various ways that features of the global governance of involuntary migration²⁰ itself make the problem of xenophobia worse.²¹ Study of the Framework reveals priority of what I have identified elsewhere as the *prejudice approach* to combatting the problem of xenophobia.²² Through this

19. See G.A. Res. 71/1, ¶ 14, New York Declaration (Sept. 19, 2016), <http://www.unhcr.org/en-us/events/conferences/57e39d987/new-york-declaration-refugees-migrants.html> [<https://perma.cc/PY2A-PLW5>] (archived Jan. 19, 2019) [hereinafter New York Declaration] (“[w]e strongly condemn acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants”).

20. Global governance can be defined as “any purposeful activity intended to ‘control’ or influence someone else that either occurs in the arena occupied by nations or, occurring at other levels, projects influence into that arena.” Lawrence S. Finkelstein, *What is Global Governance?*, 1 GLOBAL GOVERNANCE 367, 368 (1995). I focus more narrowly here on the international (and regional) legal and policy regimes that regulate involuntary migration, as well as the national (and regional) practices of states in the arena of involuntary migration. For an insightful account of the contradictions and harm of a “good governance” approach to migration, which treats this phenomenon as a managerial problem, see ITAMAR MANN, HUMANITY AT SEA (2016) 189–194.

21. The problem of xenophobia is broader in scope than I address in this Article. I focus on xenophobia targeting or responsive to *international migration* but xenophobia also plays itself on the basis of migration that is internal to a given nation-state, such as when those targeted as foreign are constructed as such on the basis of their ethnicity or regional origin as opposed to their formal nationality. See, e.g., Aurelia Wa Kabwe-Segatti and Loren B. Landau, *Displacement and Difference in Lubumbashi*, 27 FORCED MIGRATION REVIEW 71–72 (2007) (describing xenophobic backlash against internally displaced nationals rather than against non-nationals). The international frameworks I focus on in this Article may be less central to making sense of such cases. At the same time, even when xenophobia directly concerns international migration, it has implications for the treatment of minorities in receiving countries even when these minorities are citizens and thus formally “insiders.” Xenophobic discrimination against African or Arab refugees can amplify xenophobic discrimination against African- and Arab-Americans, for example. For examples of such instances, see *infra* Part II. This is especially important where domestic and international discourses about exclusion are mutually constitutive, and are responsive to the same incidents of mass displacement as is the case today. In the latter cases, understanding domestic xenophobia dynamics requires attention to international frameworks.

22. I first conceptualized the prejudice approach in *Beyond Prejudice* in relation to the work of one international agency—the UN Refugee Agency. Achiume, *supra* note

prejudice approach, global actors prioritize initiatives improving interpersonal relations among private citizens and involuntary migrants and guaranteeing punishment of anti-foreigner conduct explicitly motivated by prejudice. This effectively reduces the problem of xenophobia primarily to a problem of *individuals* harboring xenophobic prejudice, requiring international engagement or cooperation that combats xenophobic prejudice and its manifestations at the level of *individuals*. There is merit to anti-xenophobia intervention at this level, but a broader approach is necessary.

Global governance of involuntary migration occurs largely through international human rights law and international refugee law, which establish various rules and principles constraining states' treatment of involuntary migrants.²³ Both bodies of law provide vital protections to involuntary migrants. However, this Article argues that the governance regime they undergird has built-in gaps and incentive structures that increase opposition—including xenophobic opposition—to the admission and inclusion of involuntary migrants.²⁴ In the New York Declaration, UN member states pledge to “consider reviewing [their] migration policies with a view to examining their possible unintended negative consequences.”²⁵ This Article makes a significant contribution in this regard. It provides an account of how specific features of international law and policy on involuntary migration are seemingly themselves part of the problem of xenophobia. These flawed features reside mainly in the international law relating to refugee cost- and responsibility-sharing, and that relating to the passage and admission of involuntary migrants, as well as common state practice on these issues. Addressing these features is at least as urgent as combatting individual prejudice.

13, at 355–61. In the present Article I argue the prejudice approach prevails across the Framework, and characterizes the *global* approach as opposed to that of one institution within the Framework. More significantly, *Beyond Prejudice* focused on how a prejudice approach elides what I identified as the structural operation of xenophobic discrimination against refugees. *Id.* at 359–60. My aim here is different—I offer an account of how a prejudice approach neglects structural *drivers* of xenophobia and xenophobic exclusion, even though global involuntary migration frameworks and the international law at their core seemingly facilitate these drivers.

23. Other areas of international law, including the law of the sea, are applicable to involuntary migration but international refugee law and international human rights are the most salient for my analysis. See JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* 6–10 (Oxford Univ. Press 2007) (explaining the bases of internationally protected involuntary migration).

24. See *infra* Part II.

25. See New York Declaration, *supra* note 19, ¶ 45, but this is nowhere near enough.

The third contribution of this Article is to offer concrete proposals for how the prejudice approach could be supplemented to include serious attention to the dangerous effects that governance structures and state activity within them contribute to the problem of xenophobia. Many of the principal challenges of involuntary migration today—xenophobia included—speak to the very foundations of the nation-state system, deeply implicating popular and legal conceptions of state sovereignty. Fully confronting these challenges requires a radical rethinking of the relationship between territory and political community in our world of increasing international mobility. It is, however, beyond the scope of this Article to advance a proposal for reform at that level.²⁶ The aim here is instead to advocate for a more attainable shift in the emerging Framework, one that does not eliminate the root of the problems the Article identifies but that nonetheless diminishes the inhumanity and suffering that attends the status quo.

The remainder of this Article proceeds as follows. Part II identifies the nascent global anti-xenophobia framework in international human rights law and recent global initiatives governing involuntary displacement and explains its prejudice approach. Part III posits features in the structure and content of the global governance of involuntary migration that seem to ratchet up the problem of xenophobia, using examples from recent events of mass involuntary displacement. Part IV identifies important policy reform implications of the arguments, prior to the Article's conclusion.

II. INTERNATIONAL LAW AS A SOLUTION: AN INTRODUCTION TO THE EMERGING ANTI-XENOPHOBIA FRAMEWORK

At present, there exists a discernable but nascent apparatus this Article terms *the global anti-xenophobia framework* (or *the Framework*). The term “framework” describes developing and increasingly formalized structures of global cooperation to combat xenophobia.²⁷ The Framework presently falls short of a formal international regime

26. I offer the start of a proposal for a radical rethinking of sovereignty in relation to international migration elsewhere. See generally E. Tendayi Achiume, *Re-Imagining International Law for Global Migration: Migration as Decolonization?*, 111 AM. J. INT'L L. UNBOUND 142 (2017) (introducing a proposal for re-conceiving the movement of certain migrants across international borders today as decolonization in order to achieve a new and productive logic and ethics for international law's application to global migration, one that reflects global interconnectedness).

27. The term “global” refers to cooperation rooted in the United Nations framework, which comprises 194 states, as opposed to the term “international,” which also applies to cooperation even only between two states.

in the technical sense of the term.²⁸ Because no description of this emerging Framework exists in legal scholarship, this Part provides an overview of its architecture and identifies: (1) the international treaty law that states have agreed anchors existing international standards

28. An interdisciplinary literature on international regimes defines them as “social institutions consisting of agreed upon principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue areas.” Marc Levy, Oran Young & Michael Zürn, *The Study of International Regimes*, 1 EUROPEAN J. INT’L L. 267, 274 (1995). Stephen Krasner defines a regime as “implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185, 186 (1982). The definition I adopt is a reformulation of Krasner’s consensus definition by Marc A. Levy that aims to mitigate criticisms that scholars have leveled at the Krasner definition. Stephan Haggard and Beth Simmons usefully define regimes as “multilateral agreements among states which aim to regulate national actions within an issue area.” Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT’L ORG. 491, 495. The global refugee regime is an example of a complex regime, see Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSPECTIVES ON POLITICS 13 (2009) (“International regime complexity refers to the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered.”); Alexander Betts, *Institutional Proliferation and the Global Refugee Regime*, 7 PERSPECTIVES ON POLITICS 53, 55 (2009) (illustrating the refugee regime complex, and describing the global migration complex), and the international human rights regime is another. See Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT’L ORG. 599, 628–33 (1986) (conceptualizing single-issue human rights regimes as nested within the broader international human rights regime). Scholars have found it “useful to divide the process of regime formation into at least the following three stages: agenda formation, institutional choice, and operationalization.” Levy et al., *supra* note 28, at 282. Agenda formation is “the emergence of an issue on the political agenda, the framing of the issue for consideration in international forums, and the rise of the issue to a high enough place on the international agenda to warrant priority treatment.” *Id.* (citing JANICE G. STEIN, *GETTING TO THE TABLE: THE PROCESS OF INTERNATIONAL PRENEGOTIATION* 115–40 (John Hopkins University Press 1989)). Institutional choice moves beyond identification of a priority agenda item to agreement on the means of addressing it. See *id.* (“Institutional choice takes an issue from the point where it becomes a priority item on the international agenda to the point of agreement on the provisions of a specific regime.”). And finally, operationalization refers to all the processes necessary to implement the commitments agreed to on paper. See *id.* (“Operationalization covers all those activities required to transform an agreement on paper into a functioning social practice.”) (citing HAROLD K. JACOBSON & EDITH BROWN WEISS, *IMPLEMENTING AND COMPLYING WITH INTERNATIONAL ENVIRONMENTAL ACCORDS: A FRAMEWORK FOR RESEARCH* (1990)). The Framework described in this Part includes agenda formation and increasingly institutional choice determinations as UN bodies have initiated an anti-xenophobia protocol drafting process. The fate of this latter process and of the entire Framework remains to be determined. On the one hand, they may ultimately amount to very little. But, on the other, a live option is that the Framework will continue to progress towards deeper institutionalization and eventual operationalization. As a result, the Framework may well be a regime precursor. Its status as a possible (and even likely) regime-in-the-making warrants close attention to the Framework’s normative and institutional commitments even at this early stage.

applicable to regulating xenophobia, as well as the current anti-xenophobia protocol proposal; (2) non-binding international declaratory instruments and policy initiatives that states have used to elaborate and implement international anti-xenophobia standards; and (3) international policy and guidance that multilateral bodies have used to elaborate and implement international anti-xenophobia standards. After introducing the Framework, the Article identifies its priorities and highlights especially its conception of the appropriate role of international law and policy in combating xenophobia.

International actors, namely states and multilateral bodies largely within the United Nations, have officially articulated and located the Framework within two different but related regimes: the international human rights regime and, to a much lesser extent, the international law and policy governing migration, including international refugee law. The Article begins with a discussion of the former.

A. International Human Rights Law on Equality and Discrimination

As mentioned in the Introduction, no international treaty explicitly mentions xenophobia or xenophobic discrimination. However, international actors have conceptualized the problem of xenophobia primarily as an international human rights problem, and they have designated international human rights law as the normative and regulatory anchor for global cooperation to address it.²⁹ Within international human rights law, principles of equality, non-discrimination, and tolerance currently supply the normative commitments of the Framework. These principles of equality, non-discrimination, and tolerance are instantiated in legally binding provisions across multiple international human rights treaties, and international actors have increasingly marshalled these provisions to supply legal heft to the Framework.³⁰ An important example of such a provision is Article 26 of the International Covenant on Civil and Political Rights, which establishes equality of all persons before the law and prohibits discrimination in equal protection of the law. It also “guarantee[s] to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion,

29. See, e.g., Human Rights Council, *Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. Doc. A/HRC/32/50, ¶¶ 6–14 (2016) [hereinafter *Rep. of the Special Rapporteur*] (providing an overview of the applicable international human rights law for xenophobia).

30. *Id.*

national or social origin, property, birth or other status.”³¹ International actors thus—as an initial step—have pointed to pre-existing equality and non-discrimination obligations such as these as including international obligations to combat certain manifestations of xenophobia.³²

However, by far the most prominent international human rights treaty regime in the Framework is the International Convention on the Elimination of Racial Discrimination (ICERD).³³ This treaty anchors the global racial equality regime and provides the most comprehensive framework at the international level for combating multiple forms of discrimination and intolerance,³⁴ which helps explain why this treaty regime has been the most pronounced incubator of the Framework. Article 1.1 of ICERD prohibits racial discrimination, broadly defined as:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.³⁵

31. International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 171.

32. See, e.g., Rep. of the Special Rapporteur, *supra* note 29, ¶¶ 6–14 (identifying antidiscrimination provisions across various treaty regimes including the International Covenant on Economic, Social and Cultural Rights, all applicable to the problem of xenophobia); see also INT’L LABOR ORG. [ILO] ET AL., INTERNATIONAL MIGRATION, RACISM, DISCRIMINATION AND XENOPHOBIA 18–22 (2001), http://publications.iom.int/system/files/pdf/international_migration_racism.pdf (last visited Jan. 20, 2018) [<https://perma.cc/978J-3SEW>] (archived Jan. 20, 2018) [hereinafter *International Migration*] (identifying human rights equality and antidiscrimination provisions regulating xenophobia).

33. ICERD entered into force in 1969 and is among the most widely ratified international human rights treaties—at present it binds 177 states. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (last visited Jan. 20, 2018) [<https://perma.cc/2VCL-TJ7D>] (archived Jan. 20, 2018) [hereinafter ICERD]; UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, *Status of Ratification Interactive Dashboard*, <http://indicators.ohchr.org/> (last visited Jan. 20, 2018) [<https://perma.cc/7B8U-ZJ2Z>] (archived Jan. 20, 2019).

34. The global anti-racism regime includes many references to “intolerance,” but this term has no legal definition in international law. In his seminal treatise on ICERD, Natan Lerner defines it as describing “emotional, psychological, philosophical and religious attitudes that may cause discriminatory behavior and violations of religious freedoms, as well as acts inspired by hate or hatred, persecutions and violence.” NATAN LERNER, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* XII (rev. reprinted 2014).

35. ICERD, *supra* note 33, art. 1.1.

Thus, under this treaty unlawful “racial” discrimination may occur on grounds of ethnicity or national origin,³⁶ for example, even where the respective discriminatory purpose or effect does not implicate race (narrowly construed) as a distinct social category. In addition to this broad conception of racial discrimination incorporating multiple bases of discrimination, ICERD is widely understood to apply to intersectional discrimination—a defining feature of xenophobic discrimination.³⁷ Notwithstanding the impressive breadth of Article 1.1, the ultimate extent of ICERD’s application to problems of xenophobia against international migrants is complicated, and this Article returns to this issue shortly.

Since the adoption of ICERD, the United Nations has hosted four global conferences devoted to international action to combat racism, racial discrimination, and eventually, related intolerance (the World Conferences Against Racism or the WCARs).³⁸ From the very first WCAR in 1978, this conference has always included statements of concern for migrants that note their vulnerability to discrimination and

36. National origin and nationality differ in important respects notwithstanding the regular overlap in the two. National origin variously refers to country of origin or one’s ancestry but nationality is a legal and political status. ICERD Art. 1.1 includes national origin but not nationality. *Id.* For examples of xenophobic discrimination on the basis of national origin as opposed to nationality, see Achiume, *supra* note 13, at 331–32.

37. For a more detailed discussion of xenophobic discrimination as intersectional, see Achiume, *supra* note 13, at 331–35. The UN Refugee Agency notes that involuntary migrants are subject to xenophobic harm “on the grounds of race, colour, descent, national or ethnic origin, including in combination with other grounds, such as religion, gender and disability[.]” as well as nationality. U.N. High Comm’r. for Refugees, *Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance through a Strategic Approach*, ¶¶ 12 (Dec. 2009). The Committee on the Elimination of Racial Discrimination has affirmed ICERD’s application to intersectional discrimination. See Comm. on the Elimination of Racial Discrimination, *General Recommendation 25, Gender related dimensions of racial discrimination*, U.N. Doc. A/55/18, ¶ 1 (Mar. 20, 2000) (noting that racial discrimination sometimes affects men and women differently and in some circumstances affects women primarily or to a different degree). On the need for an intersectional approach to discrimination, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1251 (1991) (showing how the failure to account for oppression at the intersection of social categories, when combined with institutions premised on nonintersectional contexts, can shape and subsequently compromise interventions on behalf of persons located at these intersections).

38. Other UN conferences on human rights generally have also treated the issue of racism such as the 1993 World Conference on Human Rights. This conference produced the Vienna Declaration and Programme of Action, which devotes a section to racism, racial discrimination, xenophobia, and other forms of intolerance. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶¶ 20–65, U.N. Doc. A/CONF/157/23 (June 25, 1993). Unlike the 1993 World Conference on Human Rights and other international human rights conferences, however, the WCARs have had racial and related discrimination and intolerance as their unique focus.

intolerance.³⁹ But it was not until the third WCAR, which was hosted in Durban in 2001, that international actors put the problem of xenophobia on the global agenda and initiated processes for global standard-setting on this issue. The WCARs before Durban were titled "World Conference to Combat Racism and Racial Discrimination."⁴⁰ Durban was the first "World Conference Against Racism, Racial Discrimination, *Xenophobia and Related Intolerance*." According to one of the state representatives involved in organizing the Durban WCAR, xenophobia was included in the conference title "to make sure the conference would not avoid one of the worst social byproducts of economic globalization."⁴¹

In the lead up to Durban, UN bodies and officers as well as independent experts produced and reviewed research and analysis on the problem of xenophobia on a scale previously unseen at the global level.⁴² At the culmination of the conference, participating states

39. See, e.g., World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. Doc. A/CONF.189/12, ¶12 (2001) [hereinafter Durban Declaration] (calling on states to eliminate discrimination against migrant workers); World Conference to Combat Racism and Racial Discrimination, *Report of the World Conference to Combat Racism and Racial Discrimination*, U.N. Doc. A/CONF.92/40, at 7 (Aug. 1978) [hereinafter WCAR I] (placing discrimination against migrant workers on the conference agenda); see also Second World Conference to Combat Racism and Racial Discrimination, *Report of the Second World Conference to Combat Racism and Racial Discrimination*, U.N. Doc. A/CONF.119/26, at 24, ¶ 40 (1983) [hereinafter WCAR II] ("[s]tates receiving migrant workers should eliminate all discriminatory practices against such workers and their families."). Although both WCAR I and II addressed discrimination and intolerance against migrants, the first WCAR report had only one mention of xenophobia. WCAR I at 56. By the second WCAR in 1983, "xenophobia" made it into the Programme of Action, which mentioned the term once in its exhortations on the human rights of "persons belonging to minority groups, indigenous populations and migrant workers who are subjected to racial discrimination." See WCAR II at 24, ¶ 40. The phrase "with a view to combating xenophobia, host countries should develop information campaigns in order to disseminate the idea of equality between nationals and migrant workers," was added at the suggestion of the Spanish delegate during the drafting of the Programme of Action for this second WCAR. *Id.*

40. See WCAR I, *supra* note 39; WCAR II, *supra* note 39.

41. J. A. Lindgren Alves, *The Durban Conference Against Racism and Everyone's Responsibilities*, 37 U.S.F. L. REV. 971, 977 n.14 (2003).

42. For example, the International Labour Organization, the International Organization for Migration, and the UN High Commissioner for Human Rights in consultation with the UN Refugee Agency jointly produced a discussion paper titled *International Migration, Racism, Discrimination and Xenophobia* to help frame the treatment of this issue at the conference. *International Migration*, *supra* note 32. At its various sessions, the Preparatory Committee for the Durban WCAR reviewed a number of expert reports and submissions on the problem of xenophobia, including a study titled *Racial Discrimination, Xenophobia and Intolerance* by the Special Rapporteur on the Human Rights of Migrants, U.N. Doc. A/CONF.189/PC.2/23 (2001), a report of the *Expert Seminar on Racism, Refugees and Multi-Ethnic States*, U.N. Doc. A/CONF.189/PC.1/9 (2000),

adopted the Durban Declaration and Programme of Action (DDPA). The DDPA extensively references xenophobia. Notably, it recognizes xenophobia as one of the main causes of racism and human rights violations against migrants, refugees, asylum seekers, and non-nationals generally.⁴³ It reaffirms the responsibility of states to protect migrants from acts of discrimination and violence that are “perpetrated with a racist or xenophobic motivation[.]”⁴⁴ At Durban, states urged the adoption of national action plans to combat racism, racial discrimination, xenophobia and related intolerance,⁴⁵ and a number of states have since developed such plans.⁴⁶ At Durban, states also agreed on a need to develop new global standards, complementary to ICERD, to better address contemporary forms of discrimination and intolerance.⁴⁷

An important factor that may have aided the movement of xenophobia to a position of some global priority was the desire of some within the United Nations to get member states to respond to a range of extreme acts of discrimination and intolerance that occurred in the 1990s.⁴⁸ One hope was that pushing states at Durban to consider contemporary issues, including those relating to xenophobia, could avoid

and the *Note by the Secretary-General Transmitting the Report of the Consultation on the WCAR Held in Bellagio, Italy, 24–28 January 2000*, U.N. Doc. A/CONF.189/PC.1/10 (2000). Notably, the Sub-Commission on the Promotion and Protection of Human Rights stressed the need to address “widespread” xenophobia in Europe, which principally targeted refugees and migrants. *Proposals for the Work of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Working Paper Submitted by Mr. Paulo Sérgio Pinheiro, Member of the Sub-Commission, in Accordance with Sub-Commission Resolutions 1998/6 and 1999/6*, U.N. Doc. A/CONF.189/PC.1/13/Add.1 (2000).

43. Durban Declaration, *supra* note 39, at 7, ¶ 16.

44. *Id.* at 11, ¶ 48. Paragraphs 24–34 of the Programme of Action detail commitments specifically to address racism, racial discrimination, xenophobia and related intolerance against migrants and paragraphs 34–36 address the same but with respect to refugees. *Id.* at 25–28.

45. *Id.* at 32.

46. See generally CARYN ABRAHAMS ET AL., *PATHWAYS TO ANTIRACISM* (Caryn Abrahams ed. 2017), http://www.gcro.ac.za/media/reports/Pathways_to_Antiracism_REPORT_005_Lxz9ZjL.pdf (last visited Jan. 20, 2018) [<https://perma.cc/LSA5-YA9U>] (archived Jan. 20, 2018) (reviewing the NAPs of Argentina, Bolivia, Canada, Croatia, Denmark, Ecuador, France, Germany, Ireland, Luxembourg, the Netherlands, Norway, Malta, Mexico, Slovak Republic and Spain).

47. Durban Declaration, *supra* note 39, at 58, ¶ 199.

48. For example, the UN officer credited with proposing the Durban WCAR explained that part of the motivation of was the desire for a global response to issues in the 1990s such as:

[A]cts of aggression against immigrants in Europe; [] the resurgence of white supremacist doctrines that inspired armed ‘militias’ in the United States; [] intertribal killings in Africa which had reached a genocidal frenzy in the case of

the explosiveness of historically controversial issues that had dominated the early WCARs, and undermined global consensus by dividing states in acrimonious political disagreement.⁴⁹ This turned out not to be the case. The anti-Semitic vitriol of a small but vocal minority of actors dominated coverage of the Durban conference as well as much of the post-conference commentary.⁵⁰ And while Israel-Palestine issues were the most explosive at Durban, other contentious debates at the conference rehearsed persisting disagreement and contestation among states about the meaning of racism and racial discrimination and the appropriate role of global intervention to combat it. All four WCARs, including the one at Durban, have been deeply controversial as a result

Rwanda; [] aggravated Asian ethnic-religious conflicts, with killings and desecration of temples; [] the violence and hooliganism of skinheads and growing neo-Nazi groups on both sides of the Atlantic [and] . . . ; in the expansion of Fascist-like micro-nationalism often translated into practices of 'ethnic cleansing' and bloody wars.

Lindgren Alves, *supra* note 41, at 976.

49. See Corinne Lennox, *Reviewing Durban: Examining the Outputs and Review of the 2001 World Conference Against Racism*, 27 NETHERLANDS Q. OF HUM. RTS. 191, 197 (2009) ("[The Sub-Commission] hoped a focus on contemporary issues of racism, racial discrimination, xenophobia and other forms of intolerance would be a forward looking venture . . .").

50. The Durban WCAR was marred by deep conflict among states (and even among NGO-participants) on the Israel-Palestine issue that was only made worse by the violent backdrop of the Second Intifada underway before and during the conference. For an overview of the Second Intifada, see Jeremy Pressman, *The Second Intifada: Background and Causes of the Israeli-Palestinian Conflict*, 23 J. CONFLICT STUDIES (2003), <https://journals.lib.unb.ca/index.php/jcs/article/view/220/378> [<https://perma.cc/WK2R-FQK5>] (archived Jan. 20, 2018). For an assessment of the issues raised by the Israeli-Palestinian conflict at Durban, see Gay McDougall, *The World Conference Against Racism: Through a Wider Lens*, 26 FLETCHER FORUM OF WORLD AFFAIRS 135, 143–47 (2002). The United States and Israel walked out of the Durban negotiations in protest. A minority but offensive and inflammatory presence at Durban engaged in anti-Semitic intimidation of Jewish groups present at the conference. Notwithstanding the shadow cast by incidents such as these, Durban should be largely remembered for its positive achievements, which were more representative of the vast majority of conference participants. These achievements are captured well in an essay by Gay McDougall, the first American member of the Committee on the Elimination of Racial Discrimination ("CERD"). *Id.* at 139–42 (describing how the Durban WCAR, among other things, grappled with the historical and structural conditions of racism, racial discrimination, xenophobia and related intolerance; made important statements about the face of racism today; expanded the knowledge base of contemporary issues relating to racial discrimination; and laid plans for action around areas of common ground). For an assessment of Durban as flawed but more successful than prior WCARs, see Lennox, *supra* note 49, at 201 ("Durban offered important opportunities for recognition and change . . . [but] was not perfect in its execution or outcome."). For a negative assessment of Durban from the perspective of a legal advisor to the US delegation for Durban, see Christopher N. Camponovo, *Disaster in Durban: The United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 34 GEO. WASH. INT'L L. REV. 659 (2003).

of the prominence at each of some or a number of the following issues: the legacies of slavery and colonialism, including the question of reparations; the existence of apartheid in South Africa, including disagreement over global isolation of the racist regime when it was in power, as well as the legitimacy of armed struggle against it; and Israel's unlawful occupation of Palestinian territories and the rights of Palestinians within or seeking to return to Israel.⁵¹ Disagreement of this sort dates back even to the negotiation of ICERD itself, and has typically fallen along the same geopolitical fault lines, regularly pitting First World states and their allies on the one hand, against Second and Third World states on the other.⁵² Debates on xenophobia have played themselves out similarly.

In 2006, the United Nations Human Rights Council established a committee tasked with developing a new international treaty or protocol complementary to ICERD.⁵³ By doing so, the Council aimed finally to implement the international commitment secured in Durban to revamp the global anti-discrimination and anti-intolerance framework in

51. For a brief review and one perspective on this controversy over the course of the four WCARs, see Lennox, *supra* note 49, at 192–205.

52. See generally Ofra Friesel, *Race Versus Religion in the Making of the International Convention Against Racial Discrimination*, 32 L. & HIST. REV. 351 (1965) (discussing the political issues that pitted the First World on the one hand, and the Second and Third on the other, in ICERD negotiations); see also Lennox *supra* note 49, at 194–95 (recounting the salience of colonialism and its legacy in state debates to ICERD's adoption in 1965). I use the terms “First,” “Second,” and “Third” “World” as others have “to try to capture the sense of [each] as . . . political grouping[s] rather than . . . putatively ‘objective’ demographic[s] or economic coalition[s].” SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 261 (Cambridge Univ. Press 2011). See *id.* at 261–62 for a useful, short note on the Third World as a political project. The First world roughly describes industrialized capitalist countries that were the main beneficiaries of the European colonial project. The Second World refers to former Communist countries, and the Third World refers roughly to the former European colonies in Africa, Asia and Latin America.

53. U. N. Human Rights Council Decision 3/103, taken in December 2006, established an Ad Hoc Committee of the Human Rights Council on the Elaboration of Complementary Standards, and the inaugural session of this Committee was convened in 2008, pursuant to a subsequent resolution, *Elaboration of International Complementary Standards to the International Convention on the Elimination of all Forms of Racial Discrimination*, U.N. Doc. A/HRC/RES/6/21 (Sept. 28, 2007), http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_6_21.pdf (last visited Jan. 20, 2018) [<https://perma.cc/WQ2Q-BR7L>] (archived Jan. 20, 2018). This resolution convening the first session of the Ad Hoc Committee of the Human Rights Council on the Elaboration of Complementary Standards made specific reference to the salience of the problem of xenophobia. *Id.* (reporting states: “deep[] alarm[] at the sharp increase in xenophobic tendencies and intolerance towards various racial and religious groups and cultures, where people belonging to minorities, migrants, refugees, asylum seekers and illegal migrants are the worst affected victims of such tendencies and acts[.]”).

accordance with contemporary challenges ostensibly not contemplated at the time of ICERD's adoption.⁵⁴

The Ad Hoc Committee of the Human Rights Council on the Elaboration of Complementary Standards' proceedings provide the most explicit, formal articulation of the positions of states and key regional bodies such as the African Union, the European Union, the Organization of American States, and the Organization of Islamic Cooperation on how international law regulates xenophobia.⁵⁵ On at least six occasions the Ad Hoc Committee has facilitated state consultations on the international standards applicable to xenophobia and domestic implementation of these standards.⁵⁶ The debates of the Ad Hoc Committee show that, far from being issues amenable to easy consensus, xenophobia and its global regulation have reproduced familiar fissures and geopolitical configurations in this latest chapter of global intervention on discrimination and intolerance.⁵⁷

Although the mandate of the Ad Hoc Committee per the Durban Declaration and Programme of Action is to propose new standards, the Committee has spent the bulk of its time on the question of whether in the first place, new standards are necessary to complement ICERD. More precisely, it has been occupied with debating whether the prob-

54. U.N. Human Rights Council Decision 3/103 (2006) [hereinafter Decision 3/103]. Paragraph 199 of the Durban Programme of Action recommends that that the now-Human Rights Council "prepare complementary international standards to strengthen and update international instruments against racism, racial discrimination, xenophobia and related intolerance in all their aspects[.]" Durban Declaration, *supra* note 39, at 58.

55. All forty-seven member states of the UN Human Rights Council may participate in the activities of the Ad Hoc Committee. In addition, the Committee invites representatives of regional bodies such as the African Union, the European Union, the Organization of American States, and the Organization of Islamic Cooperation to participate in its proceedings. See Decision 3/103, *supra* note 54.

56. The Ad Hoc Committee on the Elaboration of Complementary Standards on Its Third, Fourth, Fifth, Sixth, Seventh, and Ninth Sessions each facilitated state consultations. See 9th Ad Hoc Comm. on the Elaboration of Complementary Standards, *Programme of Work* (Apr. 24, 2017), <http://www.ohchr.org/Documents/Issues/Racism/AdHoc9thsession/pow.pdf> (last visited Jan. 20, 2018) [<https://perma.cc/8D5W-BS8P>] (archived Jan. 20, 2018) (schedule for the ninth Ad Hoc Committee listing consultations on xenophobia); U.N. Doc. A/HRC/31/74, ¶ 14 (Feb. 26, 2016); U.N. Doc. A/HRC/28/81, ¶¶ 45, 89, 133 (Jan. 30, 2015); U.N. Doc. A/HRC/25/69, ¶¶ 73–74 (Mar. 14, 2014); U.N. Doc. A/HRC/21/59, ¶¶ 90–91 (Aug. 31, 2012); U.N. Doc. A/HRC/18/36, ¶¶ 22–33 (Sept. 6, 2011).

57. This Article focuses on contention specifically with respect to complementary standards on xenophobia but controversy shrouds the more general question of complementary standards on racism, racial discrimination, xenophobia and related intolerance. See Lennox, *supra* note 49, at 218–20 (discussing contention surrounding complementary standards to ICERD generally).

lem of xenophobia is sufficiently captured in ICERD's definition of racial discrimination, or whether instead this problem presents novel forms of discrimination and intolerance requiring novel standards. There are three general positions.

The majority of states expressing views have taken the position that additional, xenophobia-specific standards are necessary for an international regime fully equipped to deal with contemporary manifestations of xenophobia. States in this camp are largely from the Third World. On their view, the problem of xenophobia today surpasses the parameters of protection from racial discrimination as defined by Article 1 of ICERD, even if this definition offers some useful means for combatting xenophobia. Some advocate additional standards to respond to what they perceive to be more prevalent manifestations of xenophobia than previously existed. Other states argue that contemporary manifestations of xenophobia are qualitatively different from what is covered by Article 1. States supporting additional standards also express concern that the lack of an international legal definition inhibits consistency and transparency across national jurisdictions in the regulation of xenophobia.⁵⁸ Ultimately, the majority view is that ICERD is good, but not good enough.

On the other end of the spectrum are states that outright reject the need for additional international standards. On their view, the problem of xenophobia raises no sufficiently novel challenges as to warrant additional international law standards. States adopting this view have been predominantly western European and North American countries, and they challenge the utility even of formal articulation of the international legal prohibition of xenophobia.⁵⁹ The European Union and the United States, for example, have strongly opposed claims that there is a "legal vacuum" or "large gaps in the normative standards" at the international level.⁶⁰ According to the European Union, "xenophobia could be understood through other grounds of discrimination and in connection with racism and racial discrimination, and could be a compounding or additional ground for discrimination."⁶¹ According to

58. Examples of states that have supported additional standards include Venezuela, South Africa, and Morocco. Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on Its Fourth Session, U.N. Doc. A/HRC/21/59, ¶¶ 23, 35, 54 (Aug. 31, 2012).

59. According to the EU representative, "a legal definition [is] not really necessary to deal with the phenomenon of xenophobia and that the definition contained in [ICERD is] sufficient to deal with the issues of xenophobia." Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on Its Third Session, U.N. Doc. A/HRC/18/36, ¶ 58 (Sept. 6, 2011) [hereinafter Third Session].

60. *Id.* ¶¶ 74–75.

61. *Id.* ¶ 43.

the United States, “[t]he prohibited grounds for discrimination outlined in [ICERD are] broad enough to cover manifestations of xenophobia based on those protected grounds[.]”⁶² and ICERD already prohibits “xenophobic violence and discrimination.”⁶³

Finally, there are states that take an intermediary position—they have expressed uncertainty that the absence of a legal definition at the international level is of any consequence across and within national jurisdictions.⁶⁴ These states instead have suggested that CERD issue an official opinion clarifying “how provisions in [ICERD] could be applied to issues related to xenophobia and how they had been addressed in practice[.]”⁶⁵

Which view is correct? Two doctrinal issues definitely undermine ICERD’s capacity comprehensively to address the contemporary problem of xenophobia. The first is its ambivalent treatment of discrimination on the basis of citizenship, and the second is the absence of religion from Article 1’s otherwise broad definition of racial discrimination. As a result of these two issues, it is difficult to discern formal consensus among states on the precise content of the anti-xenophobia norms or ideals that ICERD advances.⁶⁶

As a general matter, what distinguishes xenophobic actions and attitudes from other intolerant actions and attitudes is that the former target persons on grounds of foreignness, a category whose treatment under ICERD is not fully determined by the text. Elsewhere I have elaborated foreignness as “the status of being an actual or perceived outsider to a given political community,” and, significantly, the construction of foreignness rests on multiple, overlapping classifications,⁶⁷ even where international migrants are concerned. For this group, the relevant membership unit is typically though not exclusively the nation-state, which means that the grounds of xenophobic discrimination

62. *Id.* ¶ 48.

63. The United States representative stated that the existing definition of racial discrimination in ICERD “prohibited xenophobic violence and discrimination,” making any attempts to pursue new definitions “dangerous.” Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on Its Fifth Session, U.N. Doc. A/HRC/25/69, ¶ 42 (Mar. 14, 2014).

64. Examples of states that have taken this position include Japan, Argentina, Brazil, Chile, Mexico and Switzerland. *Id.* ¶ 39.

65. *Id.*

66. The line between permissible and condemnable anti-foreigner attitudes, practices, policies, and structures in official state consideration of xenophobia remains remarkably fuzzy. For example, France has stated within the Ad Hoc Committee that: “xenophobia [is] essentially about treating those of another nationality differently.” Third Session, *supra* note 59, ¶ 45. Yet it is inconceivable that France would characterize all differential treatment of non-nationals as xenophobic.

67. For a detailed discussion of the definition and meaning of foreignness where xenophobia is concerned, see Achiume, *supra* note 13, at 331–34.

against international migrants will include national origin *and/or* nationality or citizenship status. Refugees and others forced to move across international borders are constructed and targeted as foreign on the basis of their nationality *combined* with other social categories, the most important of which include race, ethnicity, religion, and class.⁶⁸

Religion plays an important role in determining one's vulnerability to xenophobic discrimination and exclusion. Recent examples include actual and aspirational state policy in Europe and the United States that is discussed in the next Part, and that openly opposes admission of refugees on the basis of the religion of refugees (actual or imputed). A Christian Syrian refugee and a Muslim Syrian refugee are likely to face very different receptions in these regions, making religion a salient marker of foreigner status in this example.

Although Article 1.1 of ICERD defines prohibited racial discrimination broadly, it makes no mention of religion as a basis for prohibited racial discrimination. In fact, UN member states deliberately excluded the mention of religion in Article 1 after heated disputes regarding this issue almost derailed the entire effort to achieve an anti-racial discrimination treaty.⁶⁹ This opens the door to questions as to the extent of ICERD's application, for example, to a scenario where a state adopts a policy permitting admission of black Nigerian forced migrants who are Christian but not those who are Muslim.⁷⁰ As just alluded to, the relationship between racial and religious discrimination is complex and has been the subject of long and contentious debates among UN member states. In the lead up to ICERD's adoption, a central and divisive debate centered on whether racial and religious discrimination ought to be addressed by a single treaty, or whether it was more prudent to deal with each separately.⁷¹ Ultimately states agreed to separate the

68. See Achiume, *supra* note 13, at 331–35 (discussing foreignness as a basis for discrimination).

69. See Friesel *supra* note 52 (discussing the contentious debates surrounding race and religion in ICERD negotiation and in the lead up to these negotiations).

70. If these forced migrants were refugees, such discrimination on the basis of religion would be prohibited for states bound by international refugee law, which prohibits discrimination against refugees on the basis of religion. Convention Relating to the Status of Refugees art. 3, July 28, 1954, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. For all other involuntary migrants, the extent of legally prohibited *religious* discrimination against *non-nationals* where territorial admission is concerned is equivocal at best.

71. See LERNER, *supra* note 34, at 3–8 (summarizing the discussion on whether separate treaties were needed, or whether an additional instrument was needed to stop racial discrimination).

two, motivated predominantly by political strategy.⁷² They moved forward with ICERD, but no treaty devoted to religious discrimination and intolerance as yet exists.

While ICERD does not mention religion as a basis for prohibited racial discrimination, CERD has found that Article 1 may apply to cases involving religious discrimination where the targeted individual(s) belong to identifiable ethnic minority groups.⁷³ This is helpful when xenophobic discrimination involving religion targets a group that is also ethnically defined, but as another has argued, this latter condition is not always met in real world cases of xenophobic discrimination.⁷⁴ One widely held view is that additional guidance from CERD on religious discrimination and intolerance under ICERD, in addition to protections found in the ICCPR, would be sufficient to address any existing normative gaps with respect to religion.⁷⁵ This Article takes no

72. See generally Friesel, *supra* note 52 (providing a detailed account of the Cold War politics that pitted the United States, Britain and Israel against the USSR and the Third World in this debate).

73. For an analysis of CERD jurisprudence involving religious discrimination that reaches this conclusion, see Stephanie E. Berry, *Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole?*, 11 HUM. RTS. L. REV. 423, 431–36, 450 (2011); see also Patrick Thornberry, *Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, 5 RELIGION & HUM. RTS. 97 (2010) (for a similar analysis from a former CERD commissioner). It is important to note that religious and racial discrimination are not always conceptually or even practically severable. For example, Muneer Ahmad has compellingly argued the point that animus targeting Muslims in the United States is often racialized animus, deployed on the basis of racial ascriptions as opposed to faith or behavior. See Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1278 (2004) (“[T]he ‘Muslim-looking’ construct is neither religion- nor conduct-based.”). This insight is applicable beyond the borders of the United States, where animus targeting Muslims is often racialized animus. See, e.g., Berry, *supra*, at 446 (arguing this point in the European context); see also Emmanuel Mauleón, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. (forthcoming June 2018) (arguing the inherent racialization of religion).

74. See Berry, *supra* note 73, at 439–46 (discussing shortcomings in CERD’s jurisprudential approach for Muslims in Europe).

75. See, e.g., Hum. Rts. Council, *Complementary International Standards Compilation of Conclusions and Recommendations of the Study by the Five Experts on the Content and Scope of Substantive Gaps in the Existing International Instruments to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. Doc. A/HRC/AC.1/1/CRP.4, ¶¶ 48–50, 130 (Feb. 18, 2008) [hereinafter A/HRC/AC.1/1/CRP.4] (finding that the nexus between racism and religion is not sufficiently dealt with under international law but that a new General Recommendation from CERD and a new General Comment from the ICCPR’s Human Rights Committee would address the problem; and that “religious intolerance combined with racial and xenophobic prejudices is adequately covered under international human rights instruments); Carolyn Evans, *Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination*, 2007 BYU L. REV. 617, 619 (2007) (“[A] new treaty is

position on this more general question of the adequacy of international standards applicable to religious discrimination and intolerance. But on the narrower question of religiously informed xenophobic discrimination, guidance from CERD in the form of a General Recommendation would definitely contribute needed clarity as to the extent of ICERD's application.

Even if a CERD General Recommendation might alleviate concerns relating to religious discrimination and intolerance, the same cannot as easily be said of the thornier issue of non-national or citizenship status. At the time of ICERD's drafting, states took great pains to distinguish national origin from nationality or citizenship in the definition of prohibited racial discrimination.⁷⁶ On the one hand, national origin discrimination is prohibited racial discrimination under ICERD

not warranted at this time and it would be more fruitful to strengthen current mechanisms in order to protect religious freedom.”).

76. Footnote 36 above distinguishes national origin from nationality, but a further difference exists between citizenship and nationality in international law. From a public international law perspective, nationality is an outward facing concept, determining “the scope of application of basic rights and obligations of states vis-à-vis other states and the international community, such as personal jurisdiction, application of treaties, and claims of protection.” Kay Hailbronner, *Nationality, in* MIGRATION AND INTERNATIONAL LEGAL NORMS 75 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003). Citizenship, on the other hand, is an inward facing concept that concerns the rights and duties of the individual internal to and determined by her political community. For a useful and detailed analysis of citizenship in international law, see Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694 (2011). Although the terms “citizenship” and “nationality” are often used interchangeable, citizenship-based discrimination can differ from nationality-based discrimination. Citizenship-based discrimination tracks differential treatment of non-citizens relative to citizens. Nationality discrimination, on the other hand, may entail differential treatment *among* non-citizens of different nationalities, for example policies that might favour British nationals over Zambian nationals in admission policies. For involuntary migrants, the xenophobic discrimination they experience implicates both citizenship status and nationality in the strict sense of both. As non-citizens they are targeted as political outsiders. But in addition, specific nationalities are at higher risk of xenophobic exclusion than others. The Trump Administration Executive Order targeting nationals of Muslim-majority countries offers an example.

Article 1.1.⁷⁷ But ICERD treats nationality.⁷⁸ and citizenship-based discrimination differently. Article 1.2 of ICERD provides: "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." This provision on its face creates a carve-out seemingly permitting states wide discretion lawfully to discriminate on the basis of citizenship. This introduces significant ambiguity as to the global baseline of prohibited xenophobic discrimination. The body established by ICERD to monitor treaty implementation has advanced a narrow interpretation of the citizenship or alienage carve out, stating that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."⁷⁹ This guidance is helpful and important. But ultimately it leaves too large a grey zone where it is instead necessary to have clearer definition of the parameters of internationally prohibited and condemned manifestations of xenophobia.⁸⁰

ICERD can be read to impose significant obligations on state parties to combat facets of the problem of xenophobia, and this is an important point that should not be eclipsed by the critique advanced here.⁸¹ But even from a technical perspective that sets aside questions

77. Even after distinguishing national origin from citizenship and nationality, states expressed very different views on the meaning of national origin, revealing variations in the complex and myriad relations among ethnicity, political community and statehood that countries regarded as salient. The debates of state delegates to the Third Committee of the General Assembly provide an illustration. See Third Committee of the General Assembly, 1307th Meeting, U.N. Doc. A/C.3/SR.1307 (Oct. 18, 1965); Third Committee of the General Assembly, 1306th Meeting, U.N. Doc. A/C.3/SR.1306 (Oct. 15, 1965); Third Committee of the General Assembly, 1305th Meeting, U.N. Doc. A/C.3/SR.1305 (Oct. 14, 1965); Third Committee of the General Assembly, 1304th Meeting, U.N. Doc. A/C.3/SR.1304 (Oct. 14, 1965).

78. With respect to nationality discrimination, ICERD provides the following: "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality." ICERD, *supra* note 33, at art. 1.3.

79. U.N. Committee On The Elimination Of Racial Discrimination (CERD), General Recommendation 30: Discrimination Against Non Citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3, ¶ 4 (Oct. 1, 2002).

80. Consider, for example, that in his treatise on ICERD, Natan Lerner's assessment of the treaty is that it does not "interfere in the internal legislation of any State as far as differences in the rights of citizens and non-citizens are concerned[.]" LERNER, *supra* note 34, at 35. But see Achiume, *supra* note 13 (arguing a different perspective).

81. In *Beyond Prejudice*, for example, I argue that ICERD provides a legal basis for prohibition of certain forms of structural xenophobic discrimination. See Achiume, *supra* note 13, at 327.

of deep emancipatory potential, ICERD has limitations that vindicate the position of states in support of additional standards. Complementary standards (if achievable) could contribute much-needed clarity regarding the content of global anti-xenophobia norms,⁸² which is important for both expressive and instrumental reasons.⁸³ This assessment sets aside the independent but important question of the overall strategic prudence of attempting such reform in a global climate heavily riddled with populist nationalism.

To be clear, the legal positions of states on whether additional anti-xenophobia standards are necessary also reflect politics that are not explicitly articulated in the formal Ad Hoc Committee debates. For example, the opposition of the European Union to new global standards on xenophobia should seem curious given that this body has, at the

82. In this respect I reach a different conclusion from the expert body that considered the question of complementary standards prior to the Ad Hoc Committee, and determined that additional guidance from CERD would suffice to address "the absence of an explicit incorporation of acts of xenophobia and related intolerance in international instruments[.]" A/HRC/AC.1/1/CRP.4, *supra* note 75, ¶ 58. In my view, norm clarification at the level of states is necessary, even though the current climate suggests that normative consensus among states would be difficult to achieve.

83. One function of norm creation at the international level is expressive. In this sense, international norms make important statements about shared values and fundamental ideal commitments. For a discussion of expressive theory in the context of international law, see Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77 (2007). The expressive content of international norms directly shapes the expressive content of regional and domestic laws all over the world. This is already true of the global anti-xenophobia norms that international actors have begun articulating using international human rights law. For example, the African Union's regional migration framework incorporates by reference international human rights norms applicable to xenophobia. *The Migration Policy Framework for Africa*, Executive Council, Ninth Ordinary Session, EX.CL/276 (IX), at 25–26 (June 2006) (calling on AU member states to, "harmonize national legislation with international convention" to ensure the protection of the rights of migrants; recommending that AU member states implement the Programme of Action of the World Conference Against Racism and Xenophobia (2001) which is based on the International Convention for the Elimination of Racial Discrimination; and urging international migration and human rights organizations to coordinate anti-xenophobia activities).

Insofar as global norm creation is pursued for instrumentalist aims—e.g. eliminating or reducing xenophobic conflict—any description or evaluation of these consequentialist aspirations rests in important part on expressive statements about "what consequences count and how they should be described." Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2048 (1996). Further, where norms are introduced instrumentally to shift pre-existing norms and thereby influence behavior "the most effective use of [these new] norms is ex ante." *Id.* at 2030. Their potential rests in part on embedding in the norm clear cues for behavior or circumstances that would actually address the problem the norm seeks to counter. There is much to be gained from more clearly defined global anti-xenophobia norms.

regional level, developed the most comprehensive anti-xenophobia legal framework in existence today.⁸⁴ But EU opposition is likely motivated in part by the more longstanding unease of First World countries about the possible implications of a treaty process dedicated to revamping the global anti-racist machinery given, for example, questions of colonial reparations and other contentious issues raised at Durban. Furthermore, debates on complementary standards relating to xenophobia within the Ad Hoc Committee came hot off the heels of even more contentious debates regarding complementary standards on religious intolerance.⁸⁵ The quest for new standards on religious defamation and intolerance has been championed most strongly by the OIC, with the support of the African and Asian groups, and in the face of strong opposition from the First World.⁸⁶ Thus for the First World, the push for complementary standards on xenophobia may seem too much

84. The only existing treaty on xenophobia is regionally originated—the Council of Europe’s Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems. This treaty is open for ratification and accession by Council of Europe member states and non-member states that are parties to Council of Europe’s Convention on Cybercrime. Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Jan. 28, 2003, C.E.T.S. No. 189; see also Counsel of Europe, *Details of Treaty No. 189*, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189> (last visited Jan. 21, 2018) [<https://perma.cc/77KY-6DUJ>] (archived Jan. 21, 2018). The EU has also promulgated Council Framework Decision 2008/913/JHA on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law which “aims to approximate national criminal laws so that the same racist or xenophobic behavior constitutes an offence in all [EU] Member States[.]” Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on Its Fifth Session, U.N. Doc. A/HRC/25/69, ¶ 40 (Mar. 14, 2014).

85. For a discussion of the history and substance of debates on complementary standards on defamation, including within the context of the Ad Hoc Committee, see Dimitrina Petrova, *‘Smoke and Mirrors’: The Durban Review Conference and Human Rights Politics at the United Nations*, 10 HUM. RTS. L. REV., 129, 133–38 (2010). According to Robert Blitt, the Ad Hoc Committee moved forward with discussion of xenophobia after discussions on religious defamation and incitement imploded. See Robert C. Blitt, *Defamation of Religion: Rumors of Its Death Are Greatly Exaggerated*, 62 CASE W. RES. L. REV. 347, 367 (2011) (“[U]ltimately, the Ad Hoc Committee could only agree to move forward on discussions relating to the topic of xenophobia.”). The compelling criticisms of the push for international standards on religious defamation include concerns that the proposed formulations of these standards would result in international protection of existing blasphemy laws that threaten freedom of expression, and also undermine the very right to religious freedom. For analysis of the freedom of expression and freedom of religion concerns raised by the religious defamation “campaign,” see Blitt, *supra* note 85; Leonard A. Leo, Felice D. Gaer & Elizabeth K. Cassidy, *Protecting Religions from Defamation: A Threat to Universal Human Rights Standards*, 34 HARV. J. L. & PUB. POL’Y 769, 771–83 (2011) (discussing the defamation of religions concept).

86. Petrova, *supra* note 85, at 133–34; see also Blitt, *supra* note 85 (providing a detailed history of the religious defamation debate).

like a process through which familiar contentious proposals might gain new life. Complementary standards on xenophobia might also threaten overly expansive and discriminatory anti-terrorism mechanisms that these countries have pursued post-9/11 and that are widely recognized as raising serious human rights concerns.⁸⁷

The strong support of Third World states for complementary standards should be seen to some extent as part of a tradition beginning with ICERD of pushing forward global anti-racism standards. It should not be forgotten that in the first place, political considerations often led First World states—especially the United States—to take action that undermined progress towards a global treaty on racial discrimination prior to ICERD.⁸⁸ At the same time, however, the support for complementary standards on xenophobia, at least for a minority of countries, may reflect particular interests.⁸⁹

Despite the decade-long stalemate within the Ad Hoc Committee, the Durban goal of achieving additional standards recently moved closer to reality. In March 2017, a resolution by the UN Human Rights Council implementing an earlier directive of the UN General Assembly effectively overrode the stalemate in the Ad Hoc Committee.⁹⁰ This resolution initiated the drafting of an international protocol criminalizing

87. For example, in a report to UN High Commissioner for Human Rights, the Council of Europe acknowledged that counter-terrorism measure in the region had played a role in making Muslim communities more vulnerable to discrimination and intolerance. Letter Dated 19 December 2008 from the Secretary-General of the Council of Europe Addressed to the High Commissioner for Human Rights, Transmitting a Written Contribution of the Council of Europe to the Durban Review Conference, U.N. Doc. A/CONF.211/PC.4/6, ¶ 20 (Feb. 4, 2009).

88. See generally Friesel, *supra* note 52 (canvassing various politically motivated attempts led by the United States to sideline race in favor of religion in the negotiation of the convention).

89. On the one hand, Third World countries are defensibly concerned with anti-Muslim and even Islamophobic discriminatory post-9/11 anti-terrorism measures and this concern has likely motivated states in support of complementary standards. Lennox, *supra* note 49, at 219 (citing this motivation for the position of the African and Arab Groups on complementary standards to ICERD) and at 227–29 (providing an overview of the Organization of Islamic Countries' efforts to have the UN do more to address Islamophobia). On the other hand, some among these states may also be motivated by indefensible attempts to create international cover for religious persecution occurring nationally through enforcement of controversial blasphemy laws. For example, a detailed discussion of how enforcement of the concept of defamation of religion as applied in one country has resulted in human rights violations against minorities, see Javaid Rehman & Stephanie E. Berry, *Is "Defamation of Religions" Passé? The United Nations, Organization of Islamic Cooperation, and Islamic State Practices: Lessons from Pakistan*, 44 GEO. WASH. INT'L L. REV. 431, 453–67 (2012).

90. This resolution of the UN Human Rights Council "implement[s] the request of General Assembly contained in its resolution 71/181 by requesting the Chair-Rapporteur of the Ad Hoc Committee of the Human Rights Council on the Elaboration of Complementary Standards to the International Convention on the Elimination of All Forms

acts of a racist and xenophobic nature, about which the Article will say more shortly. This protocol, if adopted, would be the first global treaty dedicated at its inception specifically to the problem of xenophobia.

B. Ancillary Processes and Architecture in the International Law and Policy of Cross-Border Movement

The scale of recent involuntary displacement and its impact on the world's powerful countries—including the xenophobic backlash it engendered—have generated momentum for the most concerted effort to reform the global governance of migration to date.⁹¹ This global activity relating to large movements of refugees and migrants has precipitated anti-xenophobia initiatives outside the ICERD regime. These initiatives should be seen as part of the Framework.

In December 2015, the UN General Assembly adopted a resolution calling for a meeting of the heads of all UN member states for the purpose of “addressing large movements of refugees and migrants.”⁹² According to the United Nations, so-called large movements of refugees and migrants are defined not in terms of some absolute number but rather on the basis of the geographic context, capacities of the receiving states, and the impact of the suddenness or prolonged nature of such movements on receiving states.⁹³ These cross-border movements are

of Racial Discrimination to ensure the commencement of the negotiations on the draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature during the tenth session of the Ad Hoc Committee[.]” Elaboration of Complementary Standards to the International Convention on the Eliminations of All Forms of Racial Discrimination, U.N. Doc. A/HRC/34/L.31/Rev.1, ¶ 1 (Mar. 21, 2017).

91. By the first half of 2015, about 21 million people had crossed international borders in search of refuge from conflict, persecution and generalized violence or human rights violations. And by the end of 2015, 65.3 million people “were displaced from their homes by conflict and persecution[.]” the highest figure on record and a significant increase from 59.5 million the year before. Adrian Edwards, *Global Forced Displacement Hits Record High*, UNHCR: THE UN REFUGEE AGENCY (June 20, 2016), <http://www.unhcr.org/en-us/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html> (last visited Jan. 21, 2018) [<https://perma.cc/H7Y8-2GLD>] (archived Jan. 21, 2018).

92. G.A. Res. A/70/49 (II), at 14, [http://www.un.org/ga/search/view_doc.asp?symbol=A/70/49\(vol.ii\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/49(vol.ii)) (last visited Jan. 21, 2018) [<https://perma.cc/945M-2L8W>] (archived Jan. 21, 2018) (Decision 70/539(a) – High-level plenary meeting of the General Assembly on addressing large movements of refugees and migrants).

93. See U.N. Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, U.N. Doc. A/70/59, ¶ 11 (Apr. 21, 2016) [hereinafter U.N. Doc. A/70/59] (“Whether a movement is characterized as ‘large’ is less dependent on the absolute number of people moving than on its geographical context, the capacities of the receiving State to respond, and the impact . . . on the receiving country.”); New York Declaration, *supra* note 19, ¶ 6 (“[L]arge movements’ may be understood to reflect a number of considerations.”).

comprised of people who move for different reasons, and these movements are disorderly, unsafe, and “irregular”⁹⁴ in that they occur through unofficial or informal channels, often violating the policies of receiving states.

This General Assembly resolution relating to large movements was taken in the wake of a four-month period of chaotic, large-scale involuntary migration to Europe and the serious xenophobic and other backlash that followed. When the meeting to address large movements eventually took place in New York in September 2016, it resulted in the adoption by heads of UN member states of the New York Declaration. The New York Declaration is especially significant, because in recognition of today’s “unprecedented level of human mobility”⁹⁵ it does two things. First, it initiates reform of the global refugee regime, which is to culminate with the 2018 adoption of a new agreement: the Global Compact for Refugees.⁹⁶ Secondly, it initiates an intergovernmental consultative process that is to culminate with the 2018 adoption of the first international agreement devoted to reform of global governance of migration: the Global Compact on Migration.⁹⁷

International actors have linked the problem of xenophobia to the need for reform of global involuntary migration governance. In the lead up to the New York meeting of heads of states, the UN Secretary-General produced a report that among other things highlighted xenophobia, discrimination, and resulting marginalization as urgent challenges requiring global attention.⁹⁸ The New York Declaration itself underscores the seriousness of the problem of xenophobia in face of large-scale involuntary migration.⁹⁹ Both the New York Declaration and the report of the Secretary-General underscore the importance of international human rights law and principles for combatting xenophobia. They do less to highlight international refugee law as central to

94. See U.N. Doc. A/70/59, *supra* note 93, ¶¶ 10–11 (“Large movements often involve mixed flows of people who move for different reasons and use irregular channels.”).

95. New York Declaration, *supra* note 19, ¶ 3.

96. See *id.* at Annex I, ¶ 19 (“[W]e will work towards the adoption in 2018 of a global compact on refugees . . .”).

97. See *id.* at Annex II, ¶ 9 (“The global compact would be elaborated through a process of intergovernmental negotiations . . . which will begin in early 2017 . . .”).

98. U.N. Doc. A/70/59, *supra* note 93, ¶¶ 1, 40, 61. This report was produced pursuant to the General Assembly resolution convening the high-level meeting on large movements of refugees and migrants. That resolution requested from the United Nations Secretary-General “a comprehensive report . . . setting out recommendations on ways to address large movements of refugees and migrants . . .” G.A. Res. A/70/49 (II), *supra* note 92, at 70/539(b).

99. New York Declaration, *supra* note 19, ¶ 14.

protecting those who meet the refugee definition from xenophobic discrimination.¹⁰⁰

International refugee law, specifically the United Nations Convention and Protocol Relating to the Status of Refugees (UN Refugee Convention and Protocol), should indeed be seen as a cornerstone of the Framework.¹⁰¹ International refugee law affords vital protections to refugees against xenophobic exclusion and discrimination. It prohibits states from discriminating among refugees on the basis of race, religion, or country of origin,¹⁰² and this prohibition applies irrespective of whether the refugees are territorially present.¹⁰³ It also obligates states to ensure the social, economic, and even political integration of refugees in their host states.¹⁰⁴ Beyond the substantive provisions of international refugee law, the international refugee regime has also birthed one of the global institutional forerunners in terms of elaborating anti-xenophobia standards: the UN Refugee Agency. The UN Refugee Agency is arguably the most influential global actor in the administration of refugee protection, and in 2009 it released the first detailed, publicly available UN guidance note on combatting xenophobia.¹⁰⁵ Along with other bodies such as the Office of the High Commissioner for Human Rights,¹⁰⁶ the UN Refugee Agency is a key player in the Framework and will likely remain so.

100. See, e.g., U.N. Doc. A/70/59, *supra* note 93, ¶ 64 (underscoring the importance of international refugee law obligations to ensure national inclusion of refugees).

101. This is in keeping with the Durban Declaration and Programme of Action which calls for implementation of international refugee law as a vital part of the global commitment to combat xenophobia and other forms of intolerance and discrimination. See Durban Declaration, *supra* note 39, ¶ 35, at 28 (“State parties should ensure that all measures relating to refugees must be in full accordance with the 1951 Convention relating to the Status of Refugees and its 1976 Protocol.”).

102. Refugee Convention, *supra* note 70, at art. 3.

103. See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 245 (2005) (“While the English language draft of Art. 3 produced by the Second Session of the Ad Hoc Committee appeared to prohibit only discrimination by a state “against a refugee within its territory,” the French language formulation was not predicated on successful entry into a state’s territory.”). As James Hathaway notes, states regularly and flagrantly violate this obligation by implementing programs that discriminate on the basis of race, religion and country of origin. *Id.* at 239–42 (giving many examples of the different treatment of refugees in each state).

104. See *id.* at ch. 6 (analyzing the socio-economic rights of refugees), 977–90 (analyzing naturalization of refugees).

105. See Achiume, *supra* note 13, at 348–58 (canvassing UNHCR’s global influence and analyzing its 2009 Guidance Note on combatting xenophobia).

106. For example, both OHCHR and the UN Refugee Agency are at the forefront of newly launched global UN campaigns to combat xenophobia. See, e.g., UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, BUILDING PARTNERSHIPS TO PROMOTE INCLUSION AND COUNTER ANTI-MIGRANT NARRATIVES (May 11, 2007), <http://www.ohchr.org/Documents/Issues/Migration/CounterAntiMi->

The 2016 report of the Secretary-General identified the priority focus of global anti-xenophobia intervention as being to shift “the tenor of policy and public discourse on migrants and refugees[.]”¹⁰⁷ Although the report attributes xenophobic and other anti-migrant discourses and actions to structural and state-driven factors,¹⁰⁸ it highlights a different approach to addressing the fears and concerns of host communities: “Given the overwhelming evidence that personal contact significantly reduces prejudice, more creative ways of fostering contacts between host communities on the one hand and refugees and migrants on the other are urgently needed.”¹⁰⁹ It is thus no surprise that the Secretary-General initiated “a global campaign led by the United Nations to counter xenophobia”¹¹⁰ as a fundamental feature of an international regime capable of addressing large movements of migrants and refugees.¹¹¹ In the New York Declaration, UN member states went on to “commit to combating xenophobia, racism and discrimination,”¹¹² and the means through which they choose to do so are through implementation of the Secretary-General’s United Nations-led global anti-xenophobia campaign.¹¹³ At the center of this campaign, which is currently in progress, is an emphasis on “direct personal contact between host communities and refugees and migrants.”¹¹⁴ UN member states also pledged to “take a range of steps to counter [xenophobic] attitudes and behaviour, in particular with regard to hate crimes, hate speech and racial violence.”¹¹⁵

grant/KeyMessages.pdf (last visited Jan. 21, 2018) [<https://perma.cc/R5GT-GWUC>] (archived Jan. 21, 2018) (describing some of OHCHR’s work in relation to the UN Secretary General’s TOGETHER Campaign).

107. U.N. Doc. A/70/59, *supra* note 93, ¶ 40.

108. *See, e.g., id.* ¶ 37 (expressing concern that erection of fences and walls in response to large movements of refugees and migrants can reinforce xenophobia and undermine global cooperation on migration).

109. *Id.* ¶ 40.

110. *Id.* ¶ 61.

111. *Id.* (“To address [xenophobic narratives and the discrimination they incite] I have decided to initiate a global campaign led by the United Nations to counter xenophobia.”).

112. New York Declaration, *supra* note 19, ¶ 39.

113. *See* New York Declaration, *supra* note 19, ¶ 14 (“We welcome the global campaign proposed by the Secretary-General to counter xenophobia and will implement it in cooperation with the United Nations.”). In this regard, UN member states followed the explicit recommendation of the Secretary-General on xenophobia, calling on UN member states “[t]o reject political rhetoric that stigmatizes refugees and migrants, pledge to do everything possible to combat xenophobia and, in particular, to set an example by not using xenophobic language in their public discourse, and support the Secretary-General’s global campaign against xenophobia” U.N. Doc. A/70/59, *supra* note 93, ¶ 101(c)(i).

114. U.N. Doc. A/70/59, *supra* note 93, ¶¶ 61; New York Declaration, *supra* note 19, ¶ 14.

115. *Id.*

In sum, subparts A and B have articulated the laws, policy, institutional arrangements, and processes that comprise a discernable if nascent anti-xenophobia framework. It is most explicitly located in international human rights law and principles of equality, nondiscrimination, and tolerance promotion, with ICERD taking center stage. Efforts within this seam of activity have now initiated drafting of a new international treaty criminalizing acts of a xenophobic nature. International actors have also situated global anti-xenophobia intervention in processes relating to the global governance of migration and refugees. Within these migration reform processes, UN member states have highlighted the global anti-xenophobia campaign and other measures to foster contact among migrants and citizens as the primary forms of international law to combat xenophobia.

C. *The Framework's Priority Commitments: The Prejudice Approach*

In the absence of an explicit definition, a review of the Framework and its constitutive elements reveals an approach to the problem of xenophobia that treats it primarily as a problem of individuals engaging in apolitical, prejudice-motivated acts against foreigners, especially involuntary migrants. Put differently, the problem of xenophobia currently commanding the attention of international actors is that of *explicitly prejudice-based* anti-foreigner actions and attitudes of *individuals* against non-nationals. This is referred to as the *prejudice approach*.¹¹⁶ This approach crystalizes and replicates shortcomings that international and domestic scholars have associated with traditional or classical liberal rights discourses,¹¹⁷ where discrimination or subordination on the basis of social categories such as race and gender are concerned. These shortcomings inhere in classical liberalism's razor-sharp focus on the intentional acts of autonomous individual moral agents. Too often this occurs at the expense of broader social, economic, political, and legal structures that can be more salient for legal intervention that seeks to remedy social ills such as racism, sexism, or even

116. Achiume, *supra* note 13, at 355–61 and accompanying text.

117. I construe liberalism broadly as “the structuring of individual interactions in society on the basis of a set of rights that require human beings to respect each other’s liberty and equality.” JOHN CHARVET AND ELISA KACZYNSKA-NAY, *THE LIBERAL PROJECT AND HUMAN RIGHTS: THE THEORY AND PRACTICE OF A NEW WORLD ORDER* 3 (2008). A defining characteristic of liberalism is its quest to limit state coercion to the bare minimum required to uphold its fundamental values: individual liberty and equality. *Id.* at 8. I distinguish classical or traditional liberal commitments from others in acknowledgment of the arguments some have made for revisionist or new liberalism, which seeks to overcome some of the longstanding criticisms of classical liberalism’s blind spots. For a brief discussion of the divide between classical and new or revisionist liberalism, see *id.* at 5–7.

xenophobia.¹¹⁸ In this vein, the prejudice approach to the problem of xenophobia effectively reduces it primarily to a problem of individuals harboring xenophobic prejudice, and the approach consequently recommends international engagement or cooperation that combats xenophobic prejudice and its manifestations at the level of individuals.¹¹⁹

The recent Human Rights Council resolution calling for criminalization of acts of a xenophobic nature instantiates the ascendancy of the prejudice approach in the elaboration of global anti-xenophobia norms. By definition, criminal law parses the respective social problem at the level of the individual as an autonomous agent and insists on individual culpability and reprimand as the remedial intervention. This approach to xenophobia would formalize an approach that UN agencies and even international human rights non-governmental organizations have consistently advanced as essential in the fight against xenophobia.¹²⁰ Criminalization has also been a preferred approach at the regional level, at least within the European Union, which has arguably done more than any other group of states explicitly to coordinate action against xenophobia.¹²¹

118. See, e.g., A. Belden Fields and Wolf-Dieter Narr, *Human Rights as a Holistic Concept*, 14 HUM. RTS. Q. 1, 4 (1992) ("The theory of a contractual arrangement between equals, which functions as the ideological basis of law in the modern industrialized states, ignores the fact that, while people and countries are formally considered to be equals, their interactions begin from very different positions. Thus, a persistent structure of inequality in the 'world order' is maintained, modified only in its details."); see also Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 30 (Kimberlé Crenshaw et al. eds., 1995) ("The perpetrator perspective [which is in the classical liberal mold] presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon but merely as the misguided conduct of particular actors."). For a critique of international human rights liberalism that examines "the atomized, insular liberal subject on which the human rights project is based," as well the fate of those constructed as outside of this paradigm (the "Other"), which can include international migrants, see Ratna Kapur, *Take a Walk on the Dark Side*, 28 SYDNEY L. REV. 665, 666 (2006).

119. For a more detailed analysis of the prejudice approach generally, see Achiume, *supra* note 13, at 355–61.

120. Examples include various initiatives by the UN Refugee Agency and organizations such as Human Rights First's 10 Point Plan of Action for Combatting Hate Crimes.

121. In its submissions to the UN Human Rights Council's Ad Hoc Committee on Complementary Standards, as evidence of its implementation of global anti-xenophobia norms, the EU provided the example of Council Framework Decision 2008/913/JHA on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law. See Council Framework Decision 2008/913/JHA, 2008 O.J. (L 328) 55 (laying out the measures EU member states must take with regards to xenophobia).

Even outside of the criminal law frame, global discussion of best practices or strategies for combatting the problem of xenophobia have nonetheless focused on individuals and their prejudice. For example, in the reports of UN member states on the strategies they have in place to combat xenophobia, these states point also to civil and administrative measures similarly focusing on individual perpetrators of xenophobic discrimination. These include constitutional law provisions guaranteeing an individual right to equality and prohibiting discrimination and criminal and civil law provisions targeting prejudice-motivated offenses.¹²²

If these traditional antidiscrimination legal measures—especially criminalization—are one dimension of the prejudice approach, the other is embodied in the global anti-xenophobia campaign launched by the UN Secretary-General and endorsed by UN member states in the New York Declaration. As mentioned above, according to the New York Declaration, the campaign will emphasize, among other things, “direct personal contact between host communities and refugees and migrants and will highlight the positive contributions made by the latter, as well as our common humanity.”¹²³ The New York Declaration is part of a much larger trend—UN agencies and even UN member states have regularly pursued measures in the human rights education/public education/awareness-raising category with the aim of diminishing xenophobic prejudice.¹²⁴ Then and now these tolerance promotion measures engage at the level of individuals and their interpersonal relations,

122. For example, Denmark references its Constitution Act which “guarantees ‘full enjoyment of civil and political rights’ to all persons,” and Turkey cited Article 10 of the Turkish Constitution, which “prohibits discrimination [using language permitting wide judicial interpretation,] and provides for ‘special measures’ to protect particularly disadvantaged groups.” Mutuma Ruteere, *Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action*, U.N. Doc. A/71/301 (2016).

123. G.A. Res. 71/237, ¶ 25, International Migration and Development (Dec. 21, 2016).

124. For a discussion of examples of these measures, see Achiume, *supra* note 13, at 358–59. This trend continues to be manifest in ongoing negotiations for the Global Compact on migration, which has focused on the need to dispel inaccurate narratives about migrants as central to fighting xenophobia. See, e.g., United Nations Fourth Informal Interactive Multi-Stakeholder Hearing, Preparatory Process for the Global Compact For Safe, Orderly And Regular Migration And The Intergovernmental Conference On International Migration, Feb. 21, 2018, <http://www.un.org/webcast/pdfs/180221-migration.pdf> [<https://perma.cc/7QJ4-E4FA>] (archived Mar. 7, 2018) (convening multiple stakeholders to discuss strategies for changing migrant narratives).

much in the manner of criminalization and the other individual perpetrator-oriented legal interventions described above.¹²⁵

Notably, although the New York Declaration lays out a vision for reform of the global governance migration and refugees through the Global Compacts, which this Article addresses in Part III, that Declaration does not do enough to treat the problem of xenophobia as endogenous to the global governance structures. The relegation of global governance of migration and refugees, as well as of the international law and policy structuring this governance to the margins of the Framework, occurs alongside prioritization of a prejudice approach to xenophobia. To be clear, punishing individual perpetrators of xenophobic acts and taking measures to promote tolerance or counteract xenophobic attitudes have a critical role to play in the global fight against xenophobia. However, to have a prejudice approach as the bedrock of international cooperation to address xenophobia is folly, given how deeply implicated international law and the exercise of nation-state sovereignty are in the problem of xenophobia. Policing prejudice among individuals does not account for these other two important factors.

III. INTERNATIONAL LAW'S XENOPHOBIC ANXIETY RATCHETS

The global governance of involuntary migration, including through refugee law, is not incidental to the problem of xenophobia. This Part argues that, in fact, it is far more central than the prejudice approach implies. *How* refugees and migrants are admitted and included factors into levels of xenophobic and other resistance to these migrants. This Part provides an account of how shortcomings in the global governance of involuntary migration can function as “xenophobic anxiety ratchets,” compounding rather than alleviating the problem.¹²⁶ In this respect, this Article contributes to renewed scholarship examining how features of the international regulation of migration themselves contrib-

125. In a provision that breaks with the nonetheless dominant orientation towards punishing perpetrators and promoting tolerance, the New York Declaration commits states to pursuing policies to achieve social integration of refugees and migrants as a means of combatting xenophobic discrimination. Developing the Framework along these lines is vital. See Achiume, *supra* note 13 (arguing the need for a shift of this kind).

126. In technical usage, a ratchet is a specific mechanical device that permits movement in one direction only. *Ratchet*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/ratchet> [<https://perma.cc/MF3U-H3E4>] (archived Jan. 22, 2018). As a verb, to ratchet something up or down, means to cause it to rise or fall in a process that is not easy to reverse. *Id.* I describe features of the global involuntary migration governance regimes as “xenophobic anxiety ratchets” to draw attention to how these features escalate this anxiety, which is then very difficult to diffuse.

ute to disastrous migration outcomes and even construct the perception and reality of crisis currently associated with mass involuntary movement.¹²⁷ To be clear, the Article seeks not to prove conclusively that international law and policy exacerbate xenophobic anxiety but rather to posit a compelling, empirically attuned account of the relationship between international law and this phenomenon.¹²⁸

A. *Xenophobic Anxiety as Political Anxiety*

As mentioned in the Introduction, where the problem of xenophobia implicates migration across international borders, a characteristic objective associated with it is political. It entails exclusion from the nation-state and the benefits traditionally associated with such membership.¹²⁹ Such a conception of xenophobia must be a crucial starting point for global intervention targeting this problem. A rich, empirically grounded interdisciplinary literature exists theorizing xenophobic exclusion and its legitimating discourses as rooted in concerns about the

127. Ramji-Nogales, *supra* note 1, at 3 (arguing that the architecture of international migration law [is] a driver of migration crises); Ralph Wilde, 'Let them Drown': Rescuing Migrants at Sea and the Non-Refoulement Obligation as a Case Study of International Law's Relationship to 'Crisis,' EJIL: TALK! (Feb. 25, 2017), <https://www.ejiltalk.org/let-them-drown-rescuing-migrants-at-sea-and-the-non-refoulement-obligation-as-a-case-study-of-international-laws-relationship-to-crisis-part-i/> [<https://perma.cc/U44M-SDDF>] (archived Jan. 22, 2018) (discussing international law as part of the problem and solution where migrants in peril at sea are concerned).

128. My point is there is good reason to believe that features of the governance framework—along with many other complex factors—help fuel xenophobic anxiety. These features seem causally related to xenophobic anxiety even though, of course, the factors that lead nations or groups of nationals to push for the exclusion of foreigners include so much more than problems with the international law and policy of involuntary migration.

129. To reiterate, I use the term "political" to signify concerns about the *national* collective—its constitution, beneficiaries and boundaries—as distinct from individual or group concerns that are of a predominantly personal nature. For example, a parent may oppose social interaction with foreigners because she does not wish any of her children to marry a foreigner and risk altering the fiercely guarded ethnic (or racial) purity of her family. This is an example of a personal anxiety for the purposes of my current analysis. On the other hand, a parent may oppose social interactions with foreigners because she fears intermarriage undermines the purity of the nation. Although the latter clearly implicates personal considerations, concern for the national collective is also significantly non-instrumental—the wellbeing of the nation is independently meaningful. The boundary between the personal or private and the political, is of course, very fraught and I do not mean to belie this fraughtness in my analysis. A long tradition of scholars have fruitfully challenged the personal/political divide, and even while these challenges are compelling, there is residual value in distinguishing anxieties that are especially attuned to the boundaries and benefits of national political community from those that seem more concerned with other ways of affiliating. As I will argue later, the difference between an apolitical and a political conception of xenophobia has serious ramifications for comprehension of the nature of law's relationship with the problem of xenophobia.

nation-state.¹³⁰ The concept of xenophobic anxiety, which this Article uses as shorthand for the concerns (anxieties) that polity insiders mobilize in discourse and action in order to motivate, justify, or legitimate racialized or otherwise normatively suspect exclusion of foreigners, aids analysis here.¹³¹ Put differently, xenophobic anxiety refers to the legitimating or motivating discourses that at a minimum make xenophobic exclusion more socially, politically, and legally acceptable, and thus arguably more likely.¹³²

Xenophobic anxiety is a property attributable to individuals acting in their private capacity, as when a mob burns down a refugee hostel motivated by animosity toward that group, and to individuals acting in their official state capacity, as when a mayor pledges to deny municipal services to refugees of a specific religion. It is also a property attributable to political bodies or entities such as nation-states that enact policies prohibiting the territorial admission of refugees of specific national origin. In all three cases, xenophobic anxiety refers to the articulated discourses of concerns that either motivate xenophobic

130. For a comprehensive review of the dominant approaches in sociology and anthropology as they relate to xenophobic exclusion in the industrialized world, see Andreus Wimmer, *Explaining Xenophobia and Racism: A Critical Review of Current Research Approaches*, 20(1) ETHNIC AND RACIAL STUDIES 14 (1997); see also ANDREUS WIMMER, NATIONALIST EXCLUSION AND ETHNIC CONFLICT: SHADOWS OF MODERNITY (CAMBRIDGE 2002). This review does not include social psychological theories or Marxist explanatory approaches, but is instead confined to “explanations of contemporary racism and xenophobia in late industrial societies.” *Id.* at 201. For an example from the global south, see EXORCISING THE DEMONS WITHIN: XENOPHOBIA, VIOLENCE, AND STATECRAFT IN CONTEMPORARY SOUTH AFRICA 3 (Loren B. Landau ed., 2012).

131. The term “xenophobic anxiety” is partially inspired by references by various commentators to an “anxious middle”—a majority of a given polity, resistant to immigration largely due to skepticism that immigration is beneficial to the polity. See, e.g., Sunder Katwala & Will Somerville, *Engaging the Anxious Middle on Immigration Reform: Evidence from the UK Debate*, MIGRATION POL’Y INST. (May 2016), <https://www.migrationpolicy.org/research/engaging-anxious-middle-immigration-reform-evidence-uk-debate> [<https://perma.cc/LQ8U-WPM9>] (archived Jan. 22, 2018) (describing the “anxious middle” as individuals “who are skeptical about the government’s handling of immigration and worried about the effects of immigration on society and the economy”). Other legal scholars have used the terminology of anxieties to refer to concerns about migration. See, e.g., Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 526 (2000) (referring to “cultural anxieties” as a cause of the restrictionist sentiments among Americans towards immigration in the 1990s).

132. The idea that legitimating discourses have a role in bringing about or exacerbating xenophobic exclusion finds support in the work of discourse theories of xenophobia in sociology and anthropology. See Wimmer, *Explaining Xenophobia*, *supra* note 130, at 25 (reviewing, among others, discourse theories of xenophobia); see also Jens Rydgren, *Meso-Level Reasons for Racism and Xenophobia: Some Converging and Diverging Effects of Radical Right Populism in France and Sweden*, 6(1) EUR. J. OF SOC. THEORY, 45, 46 (2003) (arguing the role of political articulation—specifically the rise of anti-immigrant right-wing parties—in increasing xenophobic attitudes).

harm or are deployed to justify and legitimate it. Xenophobic anxiety at the level of the state—expressed in law, policy, and practice—may be intimately tied to xenophobic anxiety held by private individuals. In some cases, state-level anxiety is cumulative or representative in that either through formal votes or some other politically legible signalling, the xenophobic anxieties of a majority (or a politically powerful minority) are able to find expression where they might otherwise have not. In other cases, it may be that state-level anxiety is the product of unaccountable political actors whose private xenophobic anxieties underhandedly acquire the backing of state machinery.

The point here is that although prejudice among individuals may be a constituent of xenophobic anxiety, the organizing principle of this anxiety is arguably considerations about the national collective, its entitlements, and its members. And in fact, among the “xenophobically anxious,” a predicate for claims of foreigner exclusion, is a deep-seated belief that territorial or other exclusion is a legitimate entitlement of state sovereignty. Polity insiders perceive a loss of control over the territory and benefits of their polity, and today involuntary migrants—including refugees—have become an especially potent icon for this decline.¹³³ In this sense, xenophobic anxiety is responsive to actual and perceived shifts in the distribution of state sovereignty, and is in some respects a backlash that seeks to reconsolidate sovereignty in the state.¹³⁴ International law and the nation-states that author it stand at the center of global migration and refugee governance and through this governance determine the extent and terms of sovereign states’ right to exclude non-nationals as well as popular perceptions of this dimension of state sovereignty. Thus in principle, at the very least, the global governance of migration and refugees itself may impact xenophobic anxiety, even making it worse if the nature of this global governance creates or amplifies conditions correlated with national resistance to migrant admission and inclusion.

One might reasonably ask what class of anti-migrant anxiety meets the threshold of *xenophobic* anxiety. As discussed in Part I, there is no definition of xenophobia in international law. The lack of discernable consensus on the bounds of the term makes it impossible to provide a pithy definition of exactly what kind of anti-migrant anxiety qualifies as xenophobic under the prevailing international normative

133. WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* 68–69 (2010) (“Almost nothing rivals the image of immigrant hordes as incitement to xenophobic nationalism and to demands for fierce state protectionism amid globalization.”).

134. Wendy Brown has theorized the global pandemic of construction of border walls as soothing “the psychic-political desires, anxieties, and needs of late modern subjects,” triggered by waning sovereignty. *Id.* at 107.

standards. What is at stake in identifying anti-migrant anxieties as xenophobic has largely to do with the normative work performed by the term xenophobia and its cognates. Designating anxieties about the arrival or incorporation of involuntary migrants as “xenophobic” marks them as normatively out of bounds.¹³⁵ There are conceivably as many variations on the standard that should determine when anti-foreigner conduct or attitudes appropriately bear the designation “xenophobic” as there are normative positions on the duties owed to foreign nationals and the ethics of political membership.¹³⁶ Making an argument for what *should* qualify as xenophobic anxiety is an important task, but it exceeds the scope of this Article.

For the purposes of the argument here it is sufficient to offer a rough sketch of the type of anti-migrant anxiety that is a strong candidate for the designation “xenophobic,” without any pretension of providing an exhaustive account.¹³⁷ At a minimum, anti-migrant anxiety that is explicitly rooted in racial prejudice easily warrants the “xenophobic” designation, where “racial” has the broad meaning codified in Article 1.1 of ICERD. In other words, anti-migrant anxiety that intentionally seeks to exclude non-nationals because of prejudice on the basis of race, color, descent, or national or ethnic origin must count as xenophobic anxiety. In addition to anti-migrant anxiety that is explicitly rooted in racial prejudice so defined, anti-migrant anxiety that

135. Here, the work of legal scholars of immigration in the United States is useful even though much of this work focuses on “nativism,” a concept that is closely related to xenophobia. The most salient genealogy of the term “nativism” in U.S. immigration scholarship ties it to John Higham who defines it as “intense opposition to an internal minority on the ground of its foreign (i.e., ‘un-American’) connections.” JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925* 4 (1970). Linda Bosniak writes that notwithstanding deep social and political contestation regarding what discourses appropriately deserve the descriptor “nativist,” there is no question about what the descriptor does: “To call discourse or policy ‘nativist’ represents an effort to disable it through social opprobrium.” Linda Bosniak, *“Nativism” the Concept, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 284 (Juan F. Perea ed., 1997).

136. Questions regarding the appropriate norms of inclusion and exclusion of non-nationals have long occupied political and legal theorists alike, and they continue to do so today. Some examples include LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); JOSEPH H. CARENS, *THE ETHICS OF IMMIGRATION* (2013); HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

137. One need not agree fully with the working definition offered here of the class of anti-migrant anxiety that appropriately bears the label “xenophobic” in order to be persuaded by the central arguments of this Article. This Part proposes the means through which governance features exacerbate a broad swath of anti-migrant anxiety. Disagreement over what subset of that anti-migrant anxiety is xenophobic does not undermine the argument that governance features have an impact on the general universal set of political anxiety that is anti-migrant.

achieves racialized exclusion of foreigners should qualify as xenophobic. In other words, anti-migrant anxiety that *de facto* results in exclusion largely of non-nationals of a particular race, color, descent, or national or ethnic origin should also bear the designation of xenophobic, in so far as the designation aims to signal the normative acceptability of discourses or policies that distribute suffering or harm among non-nationals on a racial basis.¹³⁸

The aim of the remainder of this Part is to provide some recent examples that provide empirical support for the claim that certain features of the global governance of migration and refugees seem to increase resistance to admission and inclusion of non-nationals, and in so doing function as *xenophobic anxiety ratchets*. Crucially, they do so in a manner for which a prejudice approach alone cannot account. In mounting this critique, this Article's aim is not to undercut the present value of both the global refugee and international human rights regimes for mitigating the inhumane treatment of involuntary migrants. It is instead to provide important information about the costs one should also rightfully associate with the existing structure and content of the international law applicable to involuntary migration, and the governance regime of which it is a part.

These examples largely draw on dynamics that have occurred this decade. The intensity and scale of recent involuntary displacement across international borders are noteworthy, and the epicenter, at the time of writing of this Article, is the Syrian refugee crisis, which has been the biggest front of conflict driven displacement since the Second World War.¹³⁹ A focus on this situation is worthwhile because the scale and nature of this recent movement magnify the weaknesses of global

138. Condemnation of anti-migrant anxiety that has the *effect* of exclusion on the basis of race, colour, descent, or national or ethnic origin is consistent with ICERD's general approach to racial discrimination. Prohibited racial discrimination can occur in the absence of explicit animus, and can be based instead on disproportionate impact. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, Art. 1.1 (Jan. 4, 1969); Achiume, *supra* note 13, at 361–68 (arguing that important commitment of ICERD is “ensuring that vulnerable social groups, such as racial, ethnic, and other minority groups, do not become social underclasses, such that members of these groups are systemically denied human rights . . .”); see also WOUTER VANDENHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES 84–85 (2005) (analyzing the prohibition on indirect discrimination under various international human rights treaties).

139. For an overview of the events leading up to the Syrian conflict and an overview of the Syrian refugee crisis, see E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 695 (2015). The NATO-led intervention into Libya in 2011 is also an important part of this picture. See E. Tendayi Achiume, *Focus on Europe Neglects the Syrian Refugee Crisis*, JURIST (Nov. 12, 2015), <http://www.jurist.org/forum/2015/11/Tendayi-Achiume-Syrian-Refugees.php>. [<https://perma.cc/6LTJ-HV2B>] (archived Jan. 20, 2018).

governance of involuntary migration and mark a notable phase of a much longer history of crisis in involuntary migration.¹⁴⁰

B. Gaps in International Refugee Law: Refugee Regional Containment and Absence of a Sustainable and Equitable International Cost-Sharing Mechanism

The first claim is that the underfunded, regional containment of refugees achieved largely in formal compliance with international refugee law seemingly exacerbates xenophobic anxiety, xenophobic harm, and anti-refugee policies. To motivate this claim, some background on the Syrian refugee crisis is useful.

At the end of 2016, there were close to five million Syrian refugees, overwhelmingly concentrated in Syria's vicinity in Turkey, Lebanon, Jordan, and Iraq. Over 80 percent of Syrian refugees in the Middle East were outside of camps, living among host populations, with very limited host state or international support.¹⁴¹ Few of these refugees were authorized by their host states to work. This meant that refugee livelihood was contingent on finding informal work—typically at exploitative wages—or on engaging in dangerous survival practices. The arrival of refugees in such large numbers also severely impacted the livelihood of regional host communities. In parts of these regional host countries, the scale of Syrian displacement significantly depressed wages and inflated accommodation rentals, increasing the vulnerability of working class populations and others living close to or in poverty.

The humanitarian circumstances facing refugees and host communities in the Middle East are a partial product of the global refugee protection regime. This regime entrenches an inequitable and unsustainable distribution of the cost and responsibility of aiding refugees and their hosts.¹⁴² International refugee law requires states bound by it to protect refugees *within* their jurisdiction.¹⁴³ However, it imposes no corresponding legally binding obligation on states to assist third states unable to sustain refugees under the latter's jurisdiction. The cost of this legal arrangement is borne disproportionately by countries close to conflict, even when countries more geographically remote from

140. See Jacqueline Bhabha, *Human Mobility and the Longue Durée: The Prehistory of Global Migration Law*, 111 AM. J. OF INT'L L. 136, 136–37 (2017) (placing the substantial scale of involuntary migration today within a much longer history of crisis in involuntary human migration).

141. For an overview of the international response to the Syrian refugee crisis and an international regime within which further international cooperation to address the crisis might be achieved, see Achiume, *Syria, Cost-Sharing*, *supra* note 139, at 699.

142. *Id.* at 703.

143. Refugee Convention, *supra* note 70, at art. 33(1) (non-refoulement principle).

conflict share the blame in causing the displacement in the first place.¹⁴⁴ The Syrian refugee crisis illustrates this point, which others have identified at play elsewhere.¹⁴⁵ Although there are international law principles that provide a basis for more robust international cooperation to share the cost and responsibility of refugee protection, no widely accepted binding international law requires third states to provide assistance to any country hosting Syrian refugees.¹⁴⁶

The resources necessary for regional host countries to sustain their support of Syrian refugees are significant and far beyond the means of these states. Consider the stark example of Lebanon. In 2016, that country hosted a refugee population whose proportion of its national population (about 25 percent) is unthinkable for most states around the world, especially those in the First World. It did so with far fewer resources than those available to many of the countries that played a leading role in Syria's implosion and that remain resistant to accommodating Syrian refugees. At the same time, countries geographically remote from Syria—including those complicit in the conflict—share fully in the benefits that accrue from regional assistance of Syrian refugees.¹⁴⁷ Despite repeated appeals by regional host governments and international aid and protection agencies, international assistance to the regional protection of refugees has been abysmally low.¹⁴⁸ Under

144. See E. Tendayi Achiume, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher and Gulati*, COLUM. HUM. RTS. L. REV. ONLINE 15, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2907193 <https://perma.cc/GC5J-S7Q5> (archived Feb. 14, 2018) (discussing how powerful countries and especially countries in the global north can avoid responsibility concerning the displacement of refugees at the expense of weaker states, often times from the global south).

145. Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 297–98 (1998); B.S. Chimni, *The Law and Politics of Regional Solution of the Refugee Problem: The Case Of South Asia*, RCSS POL. STUD. 4 (1998); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 121–30 (1997).

146. Achiume, *Syria, Cost-Sharing*, *supra* note 139, at 690; T. Alexander Aleinikoff, *Rethinking the International Refugee Regime*, YALE J. INT'L L. ONLINE 4–5, <http://www.yjil.yale.edu/files/2016/09/41-spring-aleinikoff-rethinking-international-refugee-regime-1-28plgw9.pdf> [<https://perma.cc/6FS5-VV68>] (archived Jan. 21, 2018).

147. See, e.g., Alexander Betts, *International Cooperation in the Refugee Regime* in REFUGEES IN INTERNATIONAL RELATIONS 58 (Alexander Betts & Gil Loescher eds., 2010) (arguing that refugee protection has features of a public good).

148. As of September 2016 the regional refugee response effort was only forty percent funded. UNHCR, *Syria Regional Refugee Response*, Inter-Agency Sharing Portal, <http://data.unhcr.org/syrianrefugees/regional.php> [<https://perma.cc/4C63-RSCA>] (archived Jan. 22, 2018) ("Many refugees are unable to go home because of continued conflict, war, and persecution. They also may have sought protection in countries where their specific needs cannot be met. In these circumstances, UNHCR helps to resettle refugees in a third country, transferring them from an asylum country to another State

the global refugee regime, the primary formal means through which refugee populations are geographically redistributed is resettlement.¹⁴⁹ Resettlement is voluntary—it involves third states agreeing largely on their own terms to admit refugees from other countries that have granted these refugees status.¹⁵⁰ Many states outside the region have remained reluctant to resettle refugees currently in Syria's vicinity to locations elsewhere as a means of alleviating the challenges resulting from regional containment. President Trump's January Executive Order suspending Syrian refugee resettlement in the United States offers a vivid example.

The dynamic of grossly asymmetrical refugee distribution and support just described in relation to the Syrian crisis is largely representative of the global picture. In 2015, 1.8 million refugees were *newly* displaced.¹⁵¹ In that same year, industrialized countries such as the United States (66,500 resettled refugees), Canada (20,000 resettled refugees), and Australia (9,400 resettled refugees) resettled the largest numbers of refugees, but this belies the minimal nature of the overall contribution this makes. The *total* number of refugee resettlements, including by these three countries, amounted to a paltry 6 percent of 1.8 million newly displaced,¹⁵² again notwithstanding the active involvement of wealthy global hegemony in producing the displacement at hand.¹⁵³ This reality contributes to the regional concentration of refugees in the Third World, where more than 80 percent of the global refugee population has consistently been concentrated for more than two decades.¹⁵⁴ This state of affairs is in full formal compliance with the international legal regime in place. As a result, insofar as international law shapes the behavior of states and other international actors,¹⁵⁵ it currently contributes a distorted and dangerous distribution

that has agreed to admit them as refugees and ultimately grant them permanent residence.”).

149. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, at 25 (June 20, 2016), <http://www.unhcr.org/576408cd7.pdf> [<https://perma.cc/94V5-CD6A>] (archived Jan. 22, 2018).

150. In many countries, including those that have not ratified the UN Refugee Convention and its Protocol, it is the UN Refugee Agency that determines and grants refugee status in place of the refugee-hosting state.

151. UNHCR, *supra* note 149, at 6.

152. In 2015, states accepted only 107,100 refugees for resettlement. *Id.* at 8.

153. Fifty-four percent of the global refugee population comes from Syria, Afghanistan and Somalia—all countries whose conflicts have been internationalized by the involvement of foreign states. Achiume, *supra* note 144, at 3, 13.

154. UNHCR, *supra* note 149, at 14.

155. For an overview of rational actor models and constructivist models regarding how international law shapes state behavior, see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, 1944–62 (2002). The underlying pre-

of the responsibility of protecting and assisting refugees, with dire consequences for many. Countries in the Third World that are close to conflict and, which due to lack of state capacity, cannot achieve the same levels of refugee exclusion as countries in the West, shoulder the brunt of refugee protection. And countries in the West, which are both effective at and committed to refugee exclusion, have no formal legal obligations to assist.

This dysfunctional distribution of responsibility and cost, which is structured by international law, implicates the problem of xenophobia. This has arguably been the case in the context of the Syrian refugee crisis: the regional containment of refugees in the absence of robust international assistance to regional hosts and refugees has seemingly exacerbated xenophobic anxiety.

Early in the crisis the national populations of Jordan, Turkey, Lebanon, and Iraq opened their borders, neighborhoods, and homes to Syrian refugees—reports of xenophobic harm by private actors targeting Syrians or of sweeping national policies for Syrian refugee exclusion were relatively infrequent. As the numbers of Syrians seeking refuge in neighboring countries escalated, anti-foreigner attitudes, policies, and practices increased, heightening the vulnerability of Syrian refugees in the region. Turkey, which hosted close to three million Syrian refugees at the end of 2016, the vast majority outside camps, provides one example.¹⁵⁶ With the largest refugee population in the world, some towns in Turkey had more Syrian refugees than Turkish residents.¹⁵⁷ The steady rise in the refugee population as the Syrian conflict continued brought with it increasing anti-refugee tension, some of it xenophobic.¹⁵⁸ Media reports documented “extreme right wing groups . . .

sumption of the present Article is that rational actor and norm-based mechanisms reinforce each other “through a dynamic relationship,” Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621, 627 (2004), such that regime design should incorporate elements of both. For a fuller discussion of the influence of international legal regimes in the refugee responsibility sharing context, see Achiume, *Syria, Cost-Sharing*, *supra* note 139, at 702–05.

156. As of September 2016, Turkey hosts the largest population of refugees globally. The vast majority of these refugees reside outside camps. M. MURAT ERDOGAN, SYRIANS-BAROMETER-2017 31 (2017), <https://mmuraterdogan.files.wordpress.com/2016/06/syrians-barometer-executive-summary.pdf> [<https://perma.cc/754J-XUCE>] (archived Feb. 14, 2018).

157. Kilis, a Turkish town of approximately 90,000 hosted 130,000 Syrian refugees in late 2016. *Id.*

158. In 2014 the Turkish government announced it was going to take measures against growing xenophobia against refugees. *Xenophobia Against Syrian Refugees on Rise: Turkish Government*, HURRIYET DAILY NEWS (Aug. 25, 2014), <http://www.hurriyet-dailynews.com/xenophobia-against-syrian-refugees-on-rise-turkish-government.aspx?PageID=238&NID=70857&NewsCatID=341> [<https://perma.cc/X3RW-EHTW>] (archived Jan. 22, 2018).

hunting down Syrian refugees to verbally and physically attack them[.]”¹⁵⁹ In one incident in the province of Sanliurfa, an alleged knife attack and phone theft by a Syrian refugee led to protests against the presence of Syrian refugees, followed a week later by stoning of Syrian shops and attempts to lynch Syrians.¹⁶⁰ Two studies on Turkish social attitudes towards Syrian refugees reported anti-refugee discourses, some of them xenophobic.¹⁶¹ One concluded that dissipating xenophobic anxiety was contingent on improvement in the government’s management of migration and renewed support from Turkish society.¹⁶²

In addition to these private xenophobic attitudes and violence, Syrian refugees have also increasingly been subjected to anti-refugee state policies in neighboring countries as the Syrian conflict has extended. Lebanon again offers an example. Lebanon initially maintained a largely open border with Syria, allowing Syrian refugees to flee the conflict and seek refuge in its territory. However, as the conflict continued, Lebanon imposed significant border restrictions for Syrians (on occasion, it has even closed its border entirely), effectively preventing the escape from Syria of many would-be refugees. Such policy is undeniably harmful to Syrian refugees and ultimately fatal given conditions in Syria, even if Lebanon has justified this course of action on the basis of plausible economic and political concerns.¹⁶³ Resource constraints

159. Dogus Simsek, *Anti-Syrian Racism in Turkey*, OPEN DEMOCRACY (Jan. 27 2015), <https://www.opendemocracy.net/arab-awakening/dogus-simsek/antisyrrian-racism-in-turkey> [<https://perma.cc/RJX5-VDSR>] (archived Jan. 22, 2018).

160. Menekse Tokyay, *Is Xenophobia Against Syrian Refugees on the Rise in Turkey?*, AL ARABIA ENGLISH (Aug. 1, 2016), <https://english.alarabiya.net/en/perspective/analysis/2016/08/01/Is-xenophobia-against-Syrian-refugees-on-the-rise-in-Turkey-.html> [<https://perma.cc/V7KY-S4R9>] (archived Aug. 1, 2016).

161. M. Murat Erdogan, *Syrians in Turkey: Social Acceptance and Integration*, HACETTEPE UNIVERSITY MIGRATION AND POLITICS RESEARCH CENTER 4 (2014); Senay Özden, *Syrian Refugees in Turkey*, EUROPEAN UNIVERSITY INSTITUTE, MIGRATION POLICY CENTER 10–11 (2013); See also Simsek, *supra* note 159 (describing negative attitudes among Turks towards Syrian refugees).

162. M. Murat Erdogan, *Perceptions of Syrians in Turkey*, 16 INSIGHT TURKEY 65, 66 (2014).

163. Achiume, *Syria, Cost-Sharing*, *supra* note 139, at 724; Nicholas Blanford, *Is Lebanon Closing its Door to Syrian Refugees?*, CHRISTIAN SCIENCE MONITOR (Jan. 5, 2015), <http://www.csmonitor.com/World/Middle-East/2015/0105/Is-Lebanon-closing-its-door-to-Syrian-refugees-video> [<https://perma.cc/4534-H66N>] (archived Jan. 21, 2018); *Lebanon Sharply Limits Syrian Refugee Entry*, AL ARABIA ENGLISH (Oct. 18, 2014), <http://english.alarabiya.net/en/News/middle-east/2014/10/18/Lebanon-sharply-limits-Syrian-refugee-entry-.html> [<https://perma.cc/9M4E-E9U7>] (archived Jan. 21, 2018). As mentioned previously, about a quarter of Lebanon’s population is now Syrian refugees, and socio-economic conditions for refugees and Lebanese alike have dramatically deteriorated as a result of the refugee crisis. Zeinab Cherri, Pedro Arcos Gonzalez & Rafael Castro Delgado, *The Lebanese—Syrian Crisis: Impact of Influx of Syrian Refugees to an Already Weak State*, 9 RISK MGMT. AND HEALTHCARE POL’Y 165, 165–71 (2016) (consolidating assessments of the demographic, economic, social services, political and security

presided over by international law contributed to state backlash against refugee inclusion, just as these constraints seemingly fueled private xenophobia against refugees.

In sum, to recapitulate the overall claim in this subpart: the regional containment of large numbers of refugees, compounded by limited international assistance to regional hosts, seemingly exacerbates xenophobic anxiety. International law is among the variables at the center of the problem. Although international refugee law has features that qualify it as an anti-xenophobia apparatus, insofar as it structures both the regional containment of refugees and the absence of robust international cooperation, these shortcomings function as a xenophobic anxiety ratchet built into the international legal regime.

C. Gaps in International Refugee Law and in the "International Law of Migration": Chaotic and Unauthorized Movement

There is reason to believe that chaotic, irregular migration can make xenophobic anxiety and exclusion worse. This has been the case in Europe and North America.¹⁶⁴ The way that migrants move and the manner in which they arrive in receiving states can play a significant role in whether the popular response to these migrants is welcoming or hostile and even xenophobic. Popular responses to migrants are important because they can directly impact the daily treatment of territorially present migrants, and they can also shape national policies on whether these migrants are even admitted in the first place. This can happen when policymakers—through democratic processes—respond to popular pressure on how to respond to the arrival or presence of migrants. It can also happen when political and other leaders actively

impacts of the Syrian refugee crisis on Lebanon). With respect to political security concerns, in the wake of the Syrian refugee crisis, Lebanon has experienced the highest levels of sectarian conflict since its civil war. Lebanon is organized as a consociational democracy in an attempt to manage deep political divisions along religious lines—divisions that persist and result in a polity susceptible to internal conflict. See Sāmīr Makdisi & Marcus Marktanner, *Trapped by Consociationalism: The Case of Lebanon*, 11 TOPICS IN MIDDLE E. AND N. AFR. ECON. 1–5 (2009) (giving an overview of Lebanon's consociational system). There is a convincing case to be made that rapid destabilization of this balance poses a serious threat to the Lebanese nation-state. Amal Mudallali, *Lebanon's Existential Threats*, 29 VIEWPOINTS 1 (Woodrow Wilson International Center for Scholars June 2013).

164. European and North American backlash against the arrival of Syrian and other refugees and migrants in 2015–16 was remarkable, and of course attributable to host of other factors alongside the nature and scale of the movement. My point in this subsection is simply that the nature and scale of the movement were an important part of what is admittedly a much larger the explanatory picture.

exploit popular sentiment in order to advance their previously marginal xenophobic platforms. Consider the following example.

As the conflict in Syria extended, and as socioeconomic and security conditions for refugees in regional host countries deteriorated, Syrian refugees increasingly took longer and more dangerous journeys in search of refuge. To be clear, Syrian refugees remain mostly concentrated in Syria's neighbors. The UN Refugee Agency estimated that by mid-2016 only a little over 10 percent of Syrians seeking international protection had done so in Europe.¹⁶⁵ However, most Syrian refugees reaching Europe did so in the latter half of 2015. In 2014, only 137,798 Syrian refugees in total applied for asylum in Europe, but in 2015 alone, over a million refugees and other involuntary migrants traveled to Europe by sea, and Syrians constituted the largest nationality group among these.¹⁶⁶ The arrival of these refugees and other involuntary migrants on European shores trained Western media and popular attention to the Syrian refugee crisis in a way that the full-blown refugee crisis in the Middle East previously had failed to achieve.¹⁶⁷ Images of the desperate flight of tens of thousands of involuntary migrants dominated international news cycles, broadcasting the theater of deadly chaos that characterized flight into and across Europe during this period.

With the arrival of refugees and involuntary migrants in Europe from mid-2015 to early 2016, reports documented the rise of violent attacks against refugees and migrants both in countries with explicit policies welcoming these groups and in countries with explicit policies to exclude them. In Europe, Germany is the country currently hosting the largest number of Syrian refugees. In the first six months of 2015, the German Interior Ministry recorded 202 attacks on housing for asylum seekers, "including attempts to render shelters uninhabitable through arson, attacks with stones or other vandalism."¹⁶⁸ In 2014

165. UNHCR, *Europe: Syrian Asylum Applications*, INTER-AGENCY SHARING PORTAL, <http://data.unhcr.org/syrianrefugees/asylum.php> (last visited Aug. 26, 2016) [<https://perma.cc/GGS2-478D>] (archived Jan. 22, 2018).

166. *Id.*; UNHCR, *Refugees/Migrants Emergency Response—Mediterranean*, INTER-AGENCY SHARING PORTAL, <http://data.unhcr.org/mediterranean/regional.php> (last visited Aug. 26, 2016) [<https://perma.cc/2JB8-72F8>] (archived Jan. 22, 2018).

167. For my argument for why the migration crisis in Europe must be treated as ancillary to the refugee crisis in the Middle East, see Achiume, *Focus on Europe Neglects the Syrian Refugee Crisis*, *supra* note 139.

168. Melissa Eddy, *Violent Backlash Against Migrants in Germany as Asylum-Seekers Pour In*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/14/world/europe/germany-migrants-attacks-asylum-seekers-backlash.html?_r=0 [<https://perma.cc/RJN6-272N>] (archived Jan. 22, 2018).

there were 150 such acts, whereas in 2012 there were only 24.¹⁶⁹ Sweden hosts the second largest number of Syrian refugees and it, too, experienced spikes in xenophobic violence and political rhetoric, as did other European countries.¹⁷⁰

Syrian refugees and other involuntary migrants also faced aggressive xenophobic state policies, many of which were directed and buttressed by extreme right-wing political rhetoric. Frontier Eastern European EU countries such as Hungary, Slovenia, and Bulgaria erected border walls to keep refugees and migrants out, and in some cases did so in concert with western European nations.¹⁷¹ Unlike regional hosts in the Middle East, these countries rapidly responded with measures to bar the arrival of refugees and involuntary migrants seeking asylum at their borders. At the same time, some of these countries even resisted efforts within the European Union to assist frontier EU countries such as Greece and Italy that hosted a disproportionate share of refugees in the region. In 2015, Poland saw the election of the right-wing Law and Justice Party as the parliamentary majority.¹⁷² It was

169. *Id.*; OECD, INTERNATIONAL MIGRATION OUTLOOK (Sep. 22, 2015), http://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2015_migr_outlook-2015-en [<https://perma.cc/NP79-PHQV>] (archived Jan. 22, 2018).

170. Although the recent arrivals of Syrian refugees and involuntary migrants may have exacerbated xenophobic contestation, such anti-immigrant virulence preceded it. Social anthropologist Sindre Bangstad notes, for example, that “Norway has since October 2013 had the most right-wing government in Norwegian history, a coalition government between the populist right-wing Progress Party and the Conservative Party. The main mobilizing factor for the Progress Party voters since 1987 has been the party’s policies on immigration and integration—and any balanced assessment of the party’s record on this will tell you that it has long traded on bashing both refugees, immigrants and minorities—particularly so when these happen to be of Muslim background[.]” Sindre Bangstad, *Presentation for Conference on Xenophobia and Social Integration*, INSTITUTE FOR ADVANCED STUDIES, PRINCETON UNIVERSITY 2 (2015). For a fuller account of the history and trajectory of Islamophobia in Norway, see SINDRE BANGSTAD, ANDERS BREIVIK AND THE RISE OF ISLAMOPHOBIA 33–70 (2014).

171. Christoph Hasselbach, *Austria’s Rapid Reversal in Refugee Policy*, DW (Mar. 3, 2016), <http://www.dw.com/en/austrias-rapid-reversal-in-refugee-policy/a-19092684> [<https://perma.cc/3WFE-TN2R>] (archived Jan. 22, 2018) (describing Austrian collaboration with eastern EU and Balkan countries to help Macedonia close its border with EU member Greece).

172. A range of factors explain the rise to power of the right-wing, and among them was “the fear of migrants and refugees coming from predominantly Muslim countries[.]” Joanna Fomina & Jacek Kucharczyk, *Populism and Protest in Poland*, 27(4) J. OF DEMOCRACY 58, 62 (2016). In the lead up to the polls, the head of the Law and Justice Party proclaimed that migrants had already brought diseases to Europe, and would further bring “all sorts of parasites and protozoa, which . . . while not dangerous in the organisms of [the migrants], could be dangerous here [Poland].” Remi Adekoya, *A Law and Justice Victory in Poland Could be Good News for Putin* (Oct. 24, 2015), THE GUARDIAN, <https://www.theguardian.com/commentisfree/2015/oct/24/law-and-justice-poland-putin-russia> [<https://perma.cc/7JXF-T5BL>] (archived Jan. 21, 2018) (“[T]he Law

also a year in which “thousands of Poles took to the streets and social media to promote participation in anti-refugee marches across the country, organized by far-right nationalist movements[,]”¹⁷³ as large numbers of Syrian refugees sought asylum in Europe. Initially, Poland agreed to resettle Christian Syrian refugees but refused to accept Muslim refugees citing national security concerns it associated with Muslim identity.¹⁷⁴ In March 2016, the Austrian government deployed military forces to its borders and drastically reduced the number of Syrian refugees it would admit as opinion polls reported growing popularity of extreme-right wing politicians.¹⁷⁵

At least one factor to which researchers have attributed opposition to Syrian refugees arriving in Europe has been the fear within these nations of uncontrollable “floods” of involuntary migrants.¹⁷⁶ The chaotic nature of the movement of refugees and other forced migrants to Europe arguably played an important part in the xenophobic anxiety that framed backlash against these groups—backlash that spread as far as the United States.¹⁷⁷ A recent study from Greece provides

and Justice Leader, Jaroslaw Kaczynski, . . . has claimed that Muslim immigrants have ‘imposed Sharia law in parts of Sweden’, ‘occupy churches in Italy only to treat them like toilets’ and ‘engage in constant trouble-making’ in France, Germany and the UK. He has warned that migrants currently arriving in Europe could cause ‘epidemics’ as they have ‘various parasites and protozoa, which don’t affect their organisms, but which could be dangerous here.’; Jan Cienski, *Migrants Carry Parasites and Protozoa, Warns Polish Opposition Leader*, POLITICO (Oct. 14, 2015), <http://www.politico.eu/article/migrants-asylum-poland-kaczynski-election/> [<https://perma.cc/W9UL-HEGP>] (archived Jan. 22, 2018).

173. *Poland Refuses to Accept Refugees After Brussels Attack*, AL JAZEERA (Mar. 23, 2016), <http://www.aljazeera.com/news/2016/03/poland-refuses-accept-refugees-brussels-attack-160323132500564.html> [<https://perma.cc/2525-RWPM>] (archived Jan. 21, 2018).

174. “They [non-Christian refugees] can be a threat to Poland. I think it is a great way for ISIS to locate their troops . . . all around Europe,” said Miriam Shaded.” Shaded is “head of Estera, the Polish foundation that arranged the selection and immigration” of Christian refugee families entering Poland. Zosia Wasik & Henry Foy, *Poland Favors Christian Refugees from Syria*, FIN. TIMES (Aug. 21, 2015).

175. Hasselbach, *supra* note 171.

176. See, e.g., Demetrios G. Papademetriou & Natalia Banulescu-Bogdan, *Understanding and Addressing Public Anxiety About Immigration*, MIGRATION POL’Y INST. 12 (July 2016) (noting that many people no longer trust their governments to manage the migrant flows).

177. *Id.* at 10 (“The chaotic manner in which migrants and asylum seekers entered Europe in the second half of 2015 and the first few months of 2016 fueled concerns that terrorists could infiltrate these streams—anxieties that had the strongest effect not in Europe, but in the United States. The result was a huge backlash against the U.S. resettlement program (which settles the most-vetted refugees in the world), despite it bearing little resemblance to the EU situation, which is contending with mass spontaneous arrivals of mixed flows.”).

“causal evidence of the effects of exposure to the refugee crisis on support for extreme-right parties,” and its findings suggest “that a sudden and sharp increase in refugee arrivals fuels radical anti-immigrant and anti-asylum-seeker parties[.]”¹⁷⁸ Studies in other European countries corroborate this picture.¹⁷⁹

Chaotic arrival of large numbers of refugees, only made more terrifying by military deployments to keep these refugees out, can only serve to heighten the fear of polity insiders¹⁸⁰ and to reinforce an inherent association between involuntary migrants and economic- or security-related threats to the receiving state. This is the case even though mass involuntary displacement is often predictable, and—with the right international coordination—including through improved law and policy—could be addressed in a manner that instead permitted orderly, humane movement less likely to exacerbate xenophobic anxiety.

To reiterate, chaotic involuntary migration ratchets up xenophobic anxiety. Global governance of international migration is relevant here because actual and perceived “floods” of dangerous migrants can be the

178. Elias Dinas et al., *Exposure to the Refugee Crisis Moderately Increases Natives' Support for Extreme-Right Parties* 3 (2017), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=RESConf2017&paper_id=1076 [<https://perma.cc/SD2U-3BTR>] (archived Jan. 22, 2018). The authors of this study conclude: “A substantial part of the electoral backlash [in the study] . . . can be attributed to the fact that some communities [in Greece] received a disproportionately high number of asylum seekers in a very short period of time. This in turn suggests that xenophobic repercussions among natives might be mitigated if European governments were to invest more resources in supporting Mediterranean countries in processing asylum claims and allocating asylum seekers and refugees fairly across all countries [in the region].” *Id.* at 13.

179. A recent study in Denmark produced similar findings but with marked variation in the effect of refugee arrivals depending on the size of the municipality receiving the refugees, and whether the municipality was rural or urban. Christian Dustmann, Kristine Vasiljeva & Anna Piil Damm, *Refugee Migration and Electoral Outcomes*, CENTER FOR RESEARCH AND ANALYSIS OF MIGRATION 2–4 (2016) (http://www.cream-migration.org/publ_uploads/CDP_19_16.pdf) [<https://perma.cc/RNV9-GF6A>] (archived Jan. 22, 2018). A study in Austria found evidence that after an extreme right wing party doubled its share of votes on an anti-refugee/anti-migrant platform, increased contact among refugees and Austrian hosts dampened anti-refugee hostility. Andreas Steinmayr, *Exposure to Refugees and Voting for the Far-Right: (Unexpected) Results from Austria*, IZA DP No. 9790, at 3 (Mar. 2016), <http://ftp.iza.org/dp9790.pdf> [<https://perma.cc/KG75-YSNE>] (archived Feb 11, 2018). This suggests that policies managing migration might be better tailored to promote more harmonious interactions among involuntary migrants and receiving populations.

180. Chantal Thomas has argued that as migrants move from the global south to the north, the anti-trafficking and anti-smuggling international treaties adopted by the world's states at Palermo have “the effect of throwing a shadow of suspicion over entire regions of the world that are viewed thereafter as suppliers of criminality[.]” Chantal Thomas, *Undocumented Migrant Workers in a Fragmented International Order*, 25 MD. J. OF INT'L L. 187, 211, 213 (2013).

partial function of the international and regional law applicable to the movement of involuntary migrants.¹⁸¹ Insofar as xenophobic anxiety is responsive to chaotic international movement perceived by receiving nations as heralding the arrival of unmanageable “floods” of the involuntarily displaced, international law and policy seemingly makes this problem worse.

The global refugee regime specifically is also implicated here. First, disproportionate refugee responsibility sharing can drive refugees to take dangerous chaotic journeys in order to survive. Consider the fact that during periods of especially low international assistance to refugees in countries in the region such as Jordan, Syrian refugees reportedly chose to return to Syria and risk death in conflict, rather than face starvation in regional host countries.¹⁸² More generally, early research identified regional conditions of scarcity and livelihood precariousness as drivers of Syrian refugee movements from the Middle East and North Africa onward to Europe.¹⁸³ In this case, there is a sense in which shortcomings in the international law governing refugee responsibility sharing can be seen as a “push factor” contributing to the movement of refugees from the Middle East to Europe, thereby creating conditions that go on to ratchet up anxiety about resulting refugee “floods.” The factors and motivations that shape the secondary movement of refugees and other involuntary migrants from their first receiving country to another are admittedly diverse and complex, but one among

181. For an introduction to how international law, including international refugee law, contributes to the chaotic and dangerous movement of refugees and other involuntary migrants, see Ramji-Nogales, *supra* note 1. For a detailed treatment of analogous flaws in the European regional asylum system, see Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. J. 57 (2016).

182. Int'l Rescue Comm., *Syrian Refugees Warn They Have No Choice but To Return to Syria After Aid Cuts to Food, Health*, AKAWANA (Dec. 3, 2014), <http://english.ankawa.com/?p=13160> [<https://perma.cc/8YFS-LH39>] (archived Jan. 22, 2018).

183. Natalie Banulescu-Bogdan & Susan Fratzke, *Europe's Migration Crisis in Context: Why Now and What Next?* MIGRATION POL'Y INST. (Sept. 24, 2015), <https://www.migrationpolicy.org/article/europe%E2%80%99s-migration-crisis-context-why-now-and-what-next> [<https://perma.cc/M73V-5YPD>] (archived Jan. 21, 2018) (“The combination of push factors [driving movement to Europe] includes: (1) the ongoing violence and instability in origin countries that have both precipitated mass movements and made return impossible (at least in the short to medium term); (2) the deterioration of conditions in countries of first asylum which has led some, including Jordan and Lebanon, to tighten their borders, limiting access to nearby safe havens for the displaced; (3) the continued lack of opportunities to work or enroll in school for most refugees, which is a major driver of onward movements; and (4) geopolitical changes that have closed off alternative destinations, such as Libya.”).

them is livelihood conditions.¹⁸⁴ A more robust global refugee responsibility sharing framework ensuring support to regional hosts could conceivably have mitigated chaotic secondary forced movement from regional host countries to Europe.

The second means through which gaps in international refugee law make refugee movements more chaotic relates to the question of safe passage, as the following example illustrates. There have been no significant legal channels for orderly movement of those fleeing conflict in the Middle East (and elsewhere) to Europe or other more geographically remote areas,¹⁸⁵ and what international law exists exacerbates the chaos by incentivizing the construction of walls and the deployment of naval and other missions to forcibly and even fatally obstruct the movement of involuntarily displaced.¹⁸⁶ Recall that international refugee law requires states bound by it to protect refugees *within* their jurisdictions.¹⁸⁷ But passage away from conflict and persecution to safe jurisdictions is poorly protected in international law. International refugee law may impose obligations on European nations to extend protection to refugees *within* their jurisdiction,¹⁸⁸ but it does not legally

184. See, e.g., Joëlle Moret et al., *The Path of Somali Refugees into Exile*, SWISS FORUM FOR MIGRATION AND POPULATION STUDIES No. 46, at 10 (2006) (study of Somali refugees and asylum seekers in eight countries, involving almost 1000 respondents and finding that “[i]n most cases examined, secondary movements are motivated by the search for legal and socio-economic security and can be viewed as collective coping strategies aiming at diversifying both the risks related to refugee situations and the resources of the extended family”); Susan E. Zimmermann, *Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge*, 22 J REFUG. STUD. 74–96 (2009) (reviewing a number of studies finding livelihood conditions to be among the factors that compel secondary movement of refugees); Susan E. Zimmermann, *Why Seek Asylum? The Roles of Integration and Financial Support*, 48 INT’L MIGRATION 199, 224–27 (2010) (small qualitative study finding livelihood conditions to be a salient push-factor in secondary movements of Somali refugees to Europe); cf. UNHCR, *Profiling Study of Unaccompanied or Separated Afghan Children Arriving in Sweden in 2015*, at 1 (Aug. 26, 2016), <http://www.refworld.org/docid/582c789f4.html> [<https://perma.cc/FH56-C3WS>] (archived Jan. 22, 2018) (last visited Mar. 22, 2017) (study of unaccompanied or separated Afghan children in Sweden found that “discrimination, lack of access to rights, and lack of documentation as their primary motivation for leaving. Economic reasons were only mentioned by a small fraction (9%) of UASC interviewed.”).

185. Along with Syrian refugees making their way to Europe in the movements that have garnered global policy and popular attention are refugees from other conflicts in the Middle East and North Africa, including Afghanistan, Iraq, Libya, South Sudan and elsewhere.

186. See Fullerton, *supra* note 181, at 132 (discussing how EU members believe the Dublin system reduces some secondary movement); Ramji-Nogales, *supra* note 1.

187. Refugee Convention, *supra* note 70, at art. 33(1) (non-refoulement principle).

188. Article 31 of the Refugee Convention prohibits states from penalizing refugees for unlawful entry or presence. See generally HATHAWAY, *supra* note 103, 405–12 (2005).

protect their passage to these jurisdictions.¹⁸⁹ This creates strong incentives for these nations to prevent the arrivals of refugees onto their territories, by projecting border control measures far beyond the actual territories refugees are trying to access.¹⁹⁰ With almost no options for state-authorized passage to safety outside the region, even displaced persons legally entitled to protections available through refugee status opt to put their lives in the hands of smugglers, knowing fully that doing so is to risk death at sea. Many Syrian refugees and other involuntary migrants reaching Europe have done so through smuggling networks¹⁹¹ that regularly adapt to circumvent sustained and even NATO-supported European military intervention to prevent refugee and migrant arrivals.¹⁹²

The absence of safe passage protections even for refugees, and especially when they are displaced in large numbers, is not merely an unconscious international oversight. Review of the drafting record of the Refugee Convention reveals that “the drafters refused to include protections for migrants during mass movements let alone for safe passage to the country of refuge.”¹⁹³ A result of this deliberate choice is

189. As mentioned earlier, there is no right of safe passage in international refugee law, although the European Court of Human Rights has held that states may owe discrete obligations to assess the individual claims to protection that migrants might have when they are interdicted in the high seas. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 Eur. Ct. H.R. at 54 (2012). The ECtHR has also held that Article 4 of Protocol 4 of the European Convention on Human Rights, which prohibits collective expulsion, provides important protections to involuntary migrants seeking refuge in Europe. Jaya Ramji-Nogales, *Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights*, 20(1) ASIL INSIGHTS (Jan. 4, 2016). For an analysis of the failure of international law to establish mechanisms for the safe and orderly movement of people across borders, regardless of the reasons for migrating, see Ramji-Nogales, *supra* note 1, at 16–32. For an argument that the common and often collaborative practices states engage in to prevent refugee arrivals violate international law, see James C. Hathaway & Thomas Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. OF TRANSNAT'L L. 235, 243–44 (2015); see also Catheryn Costello, *It need not be like this*, 51 FORCED MIGRATION REV. 1, 13–14 (2016) (describing the failure of the EU to provide a right to safe passage for refugees).

190. See Hathaway & Gammeltoft-Hansen, *supra* note 189, at 244–56 (2015) (describing the old and new *non-entrée* mechanisms that powerful states have developed to project their borders outwards).

191. See INTERPOL, MIGRANT SMUGGLING IS ‘A MULTINATIONAL BUSINESS,’ FINDS JOINT REPORT (May 17, 2016), <http://www.interpol.int/News-and-media/News/2016/N2016-062> (highlighting the vast criminal network of smuggling as a multinational business) [<https://perma.cc/D9YW-4WBG>] (archived Jan. 22, 2018).

192. See Michael Birnbaum, *Smuggling Refugees into Europe Is a New Growth Industry*, THE WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/world/europe/smuggling-refugees-into-europe-is-a-new-growth-industry/2015/09/03/398c72c4-517f-11e5-b225-90edbd49f362_story.html [<https://perma.cc/XWL3-F9RF>] (archived Jan. 21, 2018) (discussing the methods used by Syrian smugglers networks).

193. Ramji-Nogales, *supra* note 1, at 24–26.

disorderly, inhumane mass movement of refugees when they flee their countries of origin and seek safety in better-resourced regions more distant from the conflict. In this way, gaps in international refugee law contribute to xenophobic anxiety.

Involuntary migration is also made more chaotic and dangerous by the failure of international law to provide a global framework attuned to forms of coerced movement falling outside the refugee definition. International and regional law provide limited options for legal and orderly movement and admission of non-refugees, creating incentives for dangerous, desperate migrant journeys.¹⁹⁴ As mentioned above, international refugee law only grants protection to those fleeing a narrowly circumscribed category of persecution relative to the actual factors that motivate involuntary international migration.¹⁹⁵ There are many sharing migration routes with refugees whose movement is coerced by extreme socioeconomic hardship, climate change-related factors, and other conditions that as a matter of law place these people beyond the protection of international refugee law. In this respect, the international migration law governing involuntary displacement and migration is woefully inadequate—it puts no system in place to respond in a humane and organized fashion to displacement and migration that is also largely foreseeable. This means that from the perspective of international law, states owe too many of the people making dangerous journeys too few obligations extraterritorially and may exclude these populations referred to in popular discourse as “economic migrants” on an almost unfettered discretionary basis.¹⁹⁶ With few viable legal options for moving across international borders, even where this international

194. Consider, for example, that notwithstanding German policy in 2015 welcoming Syrian refugees many European countries between Syria and Germany clamped down harshly to prevent the movement of Syrian refugees, even countries themselves bound by international refugee law. This led to a boom in business for smugglers, and loss of life for desperate involuntary migrants such as 71 refugees who were found dead in an abandoned truck on an Austrian road, after Hungary shutdown refugee access to trains traveling to western Europe. Alexander Weber et al., *Four Suspects Held After Austria Discovers 71 Dead Refugees*, Bloomberg (Aug. 28, 2015), <https://www.bloomberg.com/news/articles/2015-08-28/refugee-deaths-in-austrian-truck-exceed-70> [<https://perma.cc/HXT5-Y4C2>] (archived Jan. 22, 2018); *Hungary's Xenophobia, Europe's Crisis*, BLOOMBERG (Sept. 2, 2015), <https://www.bloomberg.com/view/articles/2015-09-02/hungary-s-xenophobia-europe-s-crisis> [<http://perma.cc/6NMK-8287>] (archived Jan. 22, 2018).

195. Francois Crepeau & Idil Atak, *Global Migration Governance: Avoiding Commitments on Human Rights, Yet Tracing a Course of Cooperation*, 34 NETH. Q. OF HUM. RTS. 113, 120 (2016) (“Today this regime is facing difficulties in adequately addressing the protection needs of forced migrants.”).

196. See RACHEL MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 6–10 (2007) (explaining the basis of internationally protected involuntary migration).

movement benefits both involuntary migrants and receiving states, migrants pursue unauthorized and often predictably chaotic alternatives.¹⁹⁷ States then respond with haphazard but coordinated efforts to repel these unauthorized migrants that then incentivize alternate and often even more dangerous journeys as these migrants circumvent efforts to keep them out. The resulting chaos reinforces the specter among receiving populations of threatening, unvetted foreigners who pose a security threat. These populations are then arguably more likely to support sweeping exclusionary measures because of heightened xenophobic and other anti-migrant anxiety.

Above is a story of how gaps in international law and certain state policies fuel backlash against involuntary migrants, some of it xenophobic. In the last few years, such backlash has subsequently fueled deterioration of migration policy. This deterioration takes the form, among others, of policies that then worsen international law's xenophobic anxiety-inducing features (e.g., furthering the poorly resourced regional containment of refugees). This raises the specter of a vicious cycle.¹⁹⁸ Although many complex factors explain the failure to achieve equitable and sustainable distribution of refugees within the European Union, and globally for that matter, xenophobic anxiety is a part of the equation. Popular and political opposition to refugees and involuntary migrants across Europe has raised the political costs of humane and

197. A recent study on involuntary migration channels into Europe finds that the available data suggests that “[a] plurality of people seeking humanitarian protection arrives via unauthorised channels[.]” Susan Fratzke & Brian Salant, *Tracing the Channels Refugees Use to Seek Protection in Europe 1*, MIGRATION POLICY INSTITUTE (2017). It also underscores the need for better data on involuntary migration channels.

198. This cycle would take the following form: legal and policy failure exacerbate xenophobic anxiety → xenophobic anxiety deteriorates law and policy regulating involuntary migration → deteriorated law and policy further exacerbate xenophobic anxiety and so on.

even economically beneficial admission of these groups across that continent.¹⁹⁹ German Chancellor Angela Merkel's welcoming of Syrian refugees provided an example, when she faced a tough road to re-election in part due to her stance on refugees.²⁰⁰

Worse still, xenophobic anxiety directed at Syrian refugees and other involuntary migrants from North Africa and the Middle East has traveled far further than the refugees and migrants themselves.²⁰¹ Across the Atlantic, in the United States, legislators, presidential candidates, and other public figures mobilized xenophobic anxiety in 2015 into 2016 that arguably helps explain why by the end of November 2015, the United States had accepted fewer than 2,500 Syrian refugees.²⁰² More recently, this xenophobic anxiety has contributed to initiatives such as the indefinite blanket ban on Syrian refugees seeking admission to the United States pursued by the Trump administration in early 2017, even as that administration threatened to escalate military intervention in the Middle East that would reliably produce refugees fleeing for their lives.²⁰³

Contraction of refugee responsibility sharing has also manifested in the redoubling of *active* regional containment of refugees, quite apart from passive but nonetheless impactful policies such as the refusal to accept Syrian refugees for resettlement. In 2016, the European

199. Phil Thornton, *Bank Slams European 'Xenophobia' As It Sets Out New Refugee Strategy*, GLOB. CAP. 11 (Oct. 11, 2015), <http://www.globalcapital.com/article/yvxxm9tv88zb/bank-slams-european-xenophobia-as-it-sets-out-new-refugee-strategy> [https://perma.cc/JSA4-QXME] (archived Jan. 22, 2018) (quoting the World Bank's President as saying "Many advanced economies have increasingly advanced aged populations, a rapidly shrinking workforce and very low birth rates so they need migrants and it should be part of their economic strategy to recruit the kind of immigrants that will help them[...] . . . Xenophobia is actually a very bad economic strategy . . .").

200. Jess Mchugh, *German Chancellor Angela Merkel Poll Support Drops Amid Refugee Crisis*, INT'L BUS. TIMES (May 10, 2016), <http://www.ibtimes.com/german-chancellor-angela-merkel-poll-support-drops-amid-refugee-crisis-2367038> [https://perma.cc/56AE-4WYT] (archived Jan. 22, 2018).

201. Bangstad, *Presentation for Conference on Xenophobia and Social Integration*, *supra* note 170; see Sindre Bangstad, *The Rise of the Populist Right in Norway*, BOS. REV. (June 3, 2015) ("The communicative flows of globalization and the ubiquity of various social media means that xenophobia and xenophobic discourses, imaginaries and rhetorical tropes 'travel' like never before.").

202. Ian Bremmer, *These 5 Facts Explain America's Shameful Reaction to Syrian Refugees*, TIME (Nov. 30, 2015), <http://time.com/4126371/these-5-facts-explain-americas-shameful-reaction-to-syrian-refugees/> [https://perma.cc/8RMM-SK5B] (archived Jan. 21, 2018).

203. Gabriel Samuels, *Donald Trump's First US Military Raid Kills 30 Civilians, including 10 Women and Children*, THE INDEPENDENT, <http://www.independent.co.uk/news/world/middle-east/donald-trump-us-military-attack-yemen-civilians-women-children-dead-a7553121.html> [https://perma.cc/8KX9-ENAD] (archived Jan. 22, 2018).

Union eventually managed to secure an agreement with Turkey to keep Syrian refugees and other involuntary migrants from leaving Turkey bound for the European Union.²⁰⁴ This agreement is in effect a quarantining device, reinforcing the regional containment of refugees. This reinforced regional containment may result in heightened xenophobic anxiety within Syria's vicinity. And if the EU-Turkey deal were to falter, the likelihood of resumed flows to Europe is non-trivial given that the factors driving displacement from the Middle East and North Africa remain unchanged.²⁰⁵ The chaotic movement that would result might then repeat the interplay between international law and the problem of xenophobia in the counterproductive, xenophobia-compounding dynamic already described.

In sum, there is good reason to believe that there is a causal relationship of some kind between the chaotic, poorly regulated large-scale involuntary displacement the world is witnessing and xenophobic anxiety.²⁰⁶ This chaos must be understood as intimately related to problems with the applicable international law and policy identified and the incentive structures they create for receiving states, their citizens, and involuntary migrants fleeing their countries of nationality.

IV. IMPROVING THE EMERGING ANTI-XENOPHOBIA FRAMEWORK

The crux of the argument in the previous two Parts has been that there is good reason to connect xenophobic anxiety to the law and policy governing involuntary migration. This Part discusses the implications of this claim for the developing global anti-xenophobia framework and its prejudice approach. Before doing so, however, it is necessary to address what might appear to be a mismatch between some of the more radical implications of the advanced critique and the far less radical policy implications that are nonetheless worthy of pursuit in light of all that is at stake.

204. Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal> [https://perma.cc/P4EY-ET5W] (archived Jan. 22, 2018). As others have noted, today "Global North states prefer 'regional' solutions, far from their shores, such as enhancing the protection capacity and asylum systems in partner countries and regions[.]" as opposed to solidarity and responsibility-sharing. Crepeau & Atak, *supra* note 195, at 121.

205. Ceylan Yeginsu, *Refugees Pour Out of Turkey Once More as Deal With Europe Falters*, N.Y. TIMES (Sept. 14, 2016), http://www.nytimes.com/2016/09/15/world/europe/turkey-syria-refugees-eu.html?_r=0 [https://perma.cc/E4SV-G5HD] (archived Jan. 22, 2018).

206. Although the examples above have highlighted xenophobic violence and political rhetoric, both occur in the context of widespread structural xenophobic discrimination that should be is just as alarming. Achiume, *supra* note 13, at 323, 327, 337.

A. Ideal Solutions

There are untold structural ills responsible for xenophobic anxiety and the more general problem of xenophobia that have little to do directly with international law and policy. For this reason, an international legal analysis focusing on migration such as that at the heart of this Article could hardly purport to identify “ideal solutions” where “ideal” means the problem of xenophobia would disappear entirely. But it is possible to imagine an ideal legal solution to the problem of xenophobia, where “ideal” described an alternative that would at the very least minimize law’s contribution to making the problem worse, and maximize its contribution to making it better.²⁰⁷ This subpart considers briefly what an ideal solution in this more modest utopian sense would entail.

There is a way in which the problem of xenophobia goes to the very core of the global order of nation-states and the international law that dictates the terms of nation statehood. Nation-states resist admission and inclusion of non-nationals in part because international law entitles them to do so. Although nation-states have domestic legal regimes dictating the meaning and contours of state sovereignty with respect to non-national exclusion,²⁰⁸ it is international law that dictates the structure or “container” within which these domestic regimes must fit in order for any political community to be recognized as a nation-state.²⁰⁹ The dominant formulation of the defining criteria of statehood under international law includes effective government over a defined

207. The recently completed Model International Mobility Convention, <http://globalpolicy.columbia.edu/mobility-convention>, is an example of an attempt to develop a “realistic Utopia.” Michael W. Doyle, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States they Leave, Transit or Enter*, COLUM. J. OF TRANSNAT’L. L. 1, 2 (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [<https://perma.cc/4V5W-QTTK>] (archived Jan. 22, 2018). For a commentary on this Model Convention, see E. Tendayi Achiume, *The Fatal Flaw in International Law for Migration*, 56 COLUM. J. OF TRANSNAT’L. L. 257 (2018).

208. See, e.g., *Chinese Exclusion Case* 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.”).

209. See JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 32 (2006) (citation omitted) (“In its most common modern usage, sovereignty is the term for the ‘totality of international rights and duties recognized by international law’ as residing in an independent territorial unit—the State.”).

territory.²¹⁰ Chantal Thomas notes that the “‘effective government’ criterion rests on a long tradition of positivist jurisprudence which ascribes sovereignty to the fact of coercive control over territory.”²¹¹ Perhaps even more important is international law’s designation of the nation-state as the priority vehicle for collective self-determination, and the expansive right to exclude non-nationals that international legal theory has defended as an existential feature of state sovereignty. To be sure, an absolutist conception of state sovereignty with respect to the right to exclude non-nationals is at odds with contemporary international law.²¹² However, dynamics described above suggest, as David Martin has argued, that notwithstanding the inroads that international human rights and refugee law may have made into the “complete sovereign authority over a defined territory and population,” the following remains true:

The underlying principle or default rule remains, and the restrictions on state authority arise by way of exception. Moreover, national populations, particularly in times of economic stress or security threat, tend to show strong devotion to the principle of broad state authority, and may frame demands for state action in response to such difficulties *on the assumption of wide national discretion over the entry and residence of foreigners.*²¹³

Insofar as international law buttresses such national articulation of state sovereignty, it legitimizes even acute exclusion of involuntary migrants. International law’s sovereignty doctrine should be seen as a

210. The Montevideo Convention on the Rights and Duties of States art. 1(b-c), Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. The two remaining criteria are “a permanent population” and the “capacity to enter into relations with other States.” *Id.* at art. 1(a, d).

211. Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty*, 14 MELB. J. INT’L L. 392, 415 (2013); see generally *id.* (analyzing how different political theory traditions have constructed state sovereignty, and the limitations of these constructions transmit into international law).

212. *Id.* at 404 n.43 (citing Emer de Vattel’s articulation of the “absolutist” position of the conventional view: “The sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty: everyone is obliged to pay respect to the prohibition: and whoever dares to violate it incurs the penalty decreed to render it effectual.”). It is contested that early international legal theorists, Vattel included, ever conceived of the sovereign right of national exclusion as quite so absolute. See James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 804, 807 (1983) (tracing the absolutist position to the late 19th Century when domestic law in mainly Britain and America consolidated this view of sovereignty.).

213. David A. Martin, *The Authority and Responsibility of States, in MIGRATION AND INTERNATIONAL LEGAL NORMS* 31–32 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003) (emphasis added).

predicate of xenophobic anxiety, given that this anxiety operates from a baseline of entitled exclusion.

If indeed the problem of xenophobia goes to the very foundation of the global nation-state system, then admittedly none of the recommendations briefly proposed here will truly disrupt international law's intimacy with this problem. Such a disruption would require a radical reimagining of international law and nation-state sovereignty to align it with the world at hand, which is characterized by deep historical, economical, and even territorial interconnection and interdependence.²¹⁴ This is a project too large to fit within the scope of the present Article, although it is one I have begun to explore elsewhere.²¹⁵ Instead, the remainder of this Part focuses on the implications of the arguments in Part II for policy reform that could meaningfully improve upon the status quo, even if such reform falls far short of the fundamental reordering of the international system that may be required fully to address the concerns that motivate the present intervention. The policy reform proposed below is important because it may result in less loss of life and more humane outcomes for involuntary migrants and even their hosts, than if the prejudice approach alone were to remain the trajectory of the Framework. In other words, the reform proposals below offer an important and urgent improvement on the dominant approaches.

B. *Second Bests?: Targeting the Ratchets*

The prejudice approach alone cannot account for the role of legal and policy frameworks and of nation-state actors within them in exacerbating the problem of xenophobia. An important dimension of any serious global anti-xenophobia framework must be explicit engagement with how to diffuse the foreseeable propensity of global frameworks and state actors to make the problem worse. As a result, it is important that international actors shift the trajectory of the Framework to account for xenophobic anxiety ratchets seemingly endogenous to global governance frameworks. This action is especially required of

214. Thomas, *supra* note 180, at 448. ("If sovereignty is premised upon an atomistic conception of the state of nature, then surely a more interconnected understanding of nature raises the question whether the basic presumption of autonomy that undergirds sovereignty should shift in favor of a politics of interdependence.").

215. See E. Tendayi Achiume, *Re-Imagining International Law for Global Migration: Migration as Decolonization?*, 111 AM. J. OF INT'L L. 142, 143–45 (2017) (introducing a preliminary proposal for reconceiving the movement of certain migrants across international borders today as decolonization in order to achieve a new and productive logic and ethics for international law's application to global migration, one that reflects persisting global interconnection initiated during the European colonial project).

the various UN agencies and other actors spearheading reform of the global governance of involuntary displacement, to the extent they can influence state actors to follow their lead.

Notwithstanding the acknowledged urgency of the problem of xenophobia, both the Secretary-General's report and the New York Declaration laid out a roadmap for priority global intervention that fails to take seriously the role of global migration governance frameworks and their respective incentive structures in exacerbating the problem of xenophobia.²¹⁶ This is disappointing given that the Secretary-General's report in the lead up to the New York Declaration makes pointed reference to structural drivers of xenophobia,²¹⁷ including a passing but pointed reference to the global migration governance regime.²¹⁸ Essentially, combatting xenophobia and its manifestations requires reforming the global governance of involuntary migration. The analysis in the previous Part recommends some specific interventions.

The first would involve replacing the under-funded, regional containment of refugees tolerated and facilitated by existing international law with a system for more equitably distributing the cost and responsibility of refugee protection.²¹⁹ If this account of the role played by the existing regime is correct,²²⁰ such reforms might avoid escalation of xenophobic anxiety in regions close to conflict by altering the objective conditions of scarcity and precarity that can seemingly fuel this anxiety in the Third World or in other places such as Greece that disproportionately shoulder involuntary migrant responsibility. In the New York Declaration, states introduce a Comprehensive Refugee Response

216. See *supra* Part I.

217. See, e.g., U.N. Doc. A/70/59, *supra* note 93, ¶ 37 (expressing concern that erection of fences and walls in response to large movements of refugees and migrants can reinforce xenophobia and undermine global cooperation on migration).

218. He notes: "Poor governance structures that institutionally perpetuate rather than counter exclusion, marginalization and discrimination are often structural reasons for large movements." U.N. Doc. A/70/59, *supra* note 93, ¶ 26. The argument of this Article has been that weaknesses in the governance structure seemingly shape the nature of the large movements and exacerbates resistance to migrants.

219. For examples of proposals more equitable and sustainable approaches to global refugee responsibility-sharing, see, for example, Achiume, *Syria, Cost-Sharing*, *supra* note 139, at 725, 734; Deborah Anker et al., *supra* note 145, at 295; Hathaway & Alexander Neve, *supra* note 145, at 143. For a recent market-based proposal, see Mitu Gulati & Joseph Blocher, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis* 48 COLUM. HUM. RTS. L. REV. ONLINE 53, 108–11 (2016). But see E. Tendayi Achiume, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher and Gulati*, COLUM. HUM. RTS. L. REV. ONLINE 1, 2 (2017) (offering a pragmatic and normative critique of the market-based proposal).

220. See *supra* Part III(a), REFUGEE REGIONAL CONTAINMENT AND GEOPOLITICALLY INFLECTED XENOPHOBIC ANXIETY.

Framework (CRRF) and commit to its implementation.²²¹ This CRRF is a start. For example, it proposes a number of ways to enhance global refugee cost- and responsibility-sharing.²²² However, as it stands, it creates none of the legal obligations that would increase pressure, especially on First World states and others that are not doing enough to share the cost and responsibility of involuntary displacement, to do more.²²³

The second set of reforms would aim to mitigate the chaos and inhumanity of involuntary migration, again to dampen their possible role in providing rich fodder for xenophobic anxiety. This might be achieved, for a start, by reforming the global refugee regime to include a robust mechanism for safe passage for refugees fleeing conflict, including those who are forced or chose to seek refuge beyond the regions where the conflict is located. The New York Declaration includes a commitment by UN member states to expand legal pathways to admission for refugees,²²⁴ and this commitment should also find expression in binding international legal obligations that account for the real-world factors that keep refugees' journeys dangerous.

Just as vital is the expansion of legal, orderly migration channels for international involuntary migrants whose movement is currently unauthorized or unprotected under international law.²²⁵ This includes, for example, those whose movement is forced by climate change-related events and those whose involuntary movement is forced by severe socioeconomic conditions. Many involuntary migrants—refugees included—move in search of better life chances, which they aim to achieve through securing better employment opportunities in destination countries than those that currently exist in countries of origin. These involuntary migrants, who can spend their lives in destination countries as unauthorized or “illegal” migrants, nonetheless often play

221. New York Declaration, *supra* note 19, ¶ 17.

222. *Id.* ¶ 6–16.

223. States can and do regularly violate international law, but the existence of this law also creates a basis for accountability, which can be vital for curtailing problematic state policy on migration. Domestic and regional litigation successfully challenging such practice on the basis of international and regional law are cases in point. *See, e.g., Hirsi Jamaa*, Eur. Ct. H.R. at 56–58. *But see* Ralph Wilde, ‘Unintended Consequences? Do Progressive Legal Developments Protecting Forced Migrants Undermine Protection in Other Areas?’, *AM. J. OF INT’L LAW UNBOUND* (cautioning of the importance of reckoning with the way progressive efforts towards human rights regulation of extraterritorial state activity on migration can precipitate backlash that negatively impacts migrants).

224. New York Declaration, *supra* note 19, ¶ 78.

225. For recent insights regarding reform on both fronts, see Fullerton, *supra* note 181, 127–33; Ramji-Nogales, *supra* note 1.

a part in the national prosperity of these countries.²²⁶ The labor dimension of even coerced international movement calls for a more prominent role for a body, such as the ILO,²²⁷ in global coordination efforts to combat the problem of xenophobia. It is likely that facilitating orderly labor migration channels for involuntary migrants would do more to quell xenophobic anxiety sensitive to chaotic movement than global campaigns portraying migrants positively ever could. The New York Declaration states that a Global Compact on Migration *could* include “facilitation of safe, orderly, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies; this may include the creation and expansion of safe, regular pathways of migration[.]”²²⁸ However, these features are non-optional for a functioning global migration regime and would also arguably disable or minimize the xenophobic anxiety ratchets that should be associated with the lack of legal pathways for involuntary migration.

So far this Part has made three proposals: (1) replacing the underfunded, regional containment of refugees tolerated and facilitated by existing international law with a system for more equitably distributing the cost and responsibility of refugee protection; (2) institutionalizing a means of ensuring refugees safety from conflict; and (3) expanding the legal, orderly migration channels for international involuntary migrants whose movement is currently unauthorized or unprotected under international law. All three proposals involve action that nation-states have so far been reluctant to take. The Global Compacts, however, present a perfect opportunity for change. It remains to be seen how deep these Compacts will go, reform-wise, and unfortunately the recent global salience of populist nationalist politics especially in the First World does not bode well.

By treating international migration as a phenomenon to be made more humane rather than curtailed, the purchase of this Article’s proposals may seem largely limited to those normatively oriented towards more inclusive societies. What interest would sovereign nations starting from a baseline commitment to restrictive immigration have in my proposals? For example, if the aim is diminishing xenophobic backlash

226. See, e.g., Ramanujan Nadadur, *Illegal Immigration: A Positive Economic Contribution to the United States*, 35 J. OF ETHNIC AND MIGRATION STUD. 1037, 1038 (2009) (arguing that illegal immigration has a positive impact on the US economy).

227. The ILO is a tripartite U.N. agency that “brings together governments, employers and workers of 187 member states to set labour standards, develop policies and devise programmes promoting decent work for all women and men.” INTERNATIONAL LABOUR ORGANIZATION, *About the ILO*, <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> [https://perma.cc/6GMT-3KJN] (archived Mar. 7, 2018).

228. New York Declaration, *supra* note 19, at Annex 2, Part 8(e).

and fallout, why not propose that European states or the United States invest in technologies that more effectively curtail involuntary migration in the first place? In some respects, this logic was on display in the 2016 agreement reached between Turkey and the European Union referenced above. The same logic is arguably at play in the European Union's partnerships with African states to contain migration, including through militarization of national borders of frontier and transit countries in Africa.²²⁹

The fact is that these regional containment approaches may be increasingly untenable, to say nothing of their horrific consequences. Consider that if the proportion of the global population that is international migrants remains constant, there will be 321 million international migrants by 2050.²³⁰ At the same time, more than 50 percent of global population growth until 2050 is predicted to occur in Africa.²³¹ Even if European Union-supported development initiatives are successful in improving livelihood conditions in sending countries in Africa, this may in fact initially lead to even more emigration, including towards Europe, because of the complex ways that resources shape international migration capability.²³² Current projections are that by 2050, 82 percent of population growth in high-income countries will be due to international migration.²³³

229. See, e.g., Alissa J. Rubin & Jason Horowitz, *European Leaders Look to Africa to Stem Migration*, N. Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/world/europe/africa-migrants-europe.html?action=click&contentCollection=world®ion=rank&module=package&version=highlights&contentPlacement=1&pgtype=sectionfront&r=0> [<https://perma.cc/7GSX-DHCZ>] (archived Jan. 22, 2018) (discussing recent partnerships between EU members and African states to contain migration). For analysis of human rights violations that have resulted from off-shore processing of refugees and other involuntary migrants seeking access to Europe, see Azadeh Dastyari, *Processing Centres in North Africa are Not the Answer for EU Refugees*, THE CONVERSATION (Sept. 14, 2017), <https://theconversation.com/processing-centres-in-north-africa-are-not-the-answer-for-eu-refugees-83729> [<https://perma.cc/EZ5R-63KR>] (archived Jan. 22, 2018); Daria Davitti, *Why Offshore Processing of Refugees Bound for Europe is Such a Bad Idea*, THE CONVERSATION (July, 26, 2017), <https://theconversation.com/why-offshore-processing-of-refugees-bound-for-europe-is-such-a-bad-idea-81695> [<https://perma.cc/4HHT-9W7E>] (archived Jan. 22, 2018).

230. U.N. Doc. A/70/59, *supra* note 93, ¶ 23.

231. U.N. Dep't of Econ. & Soc. Affairs, Population Div., *World Population Prospects: The 2015 Revision*, U.N. Doc. ESA/P/WP.241, at 3 (2015).

232. Research shows that the poorest of the poor do not have the means to migrate internationally. Marginal increases in socioeconomic well-being might well be insufficient to chill motivation or pressure to migrate internationally, but instead provide more people with the means to do so. See, e.g., Philip L. Martin, *Migration and Development: Toward Sustainable Solutions*, INT'L INST. FOR LAB. STUD. (Discussion paper No. 153, 2004) (stressing that economic development in a migrant-sending country is likely first to increase out-migration before it reduces it).

233. U.N. Dep't of Econ. & Soc. Affairs, *supra* note 231, at 6.

Once climate change-driven displacement is brought into the picture, global involuntary migration projections point to movement on so large a scale as to make coercive exclusionary practices either less effective or only effective with even more explicit and widespread violence than is seen today. Regional containment of involuntary migrants in north Africa, for example, which is achieved in no small part through European financing and manpower, is partly to blame for the rise of migrant slave markets reported in Niger and Libya.²³⁴ Adapting global governance of migration to contemporary and projected patterns of movement arguably requires acceptance (even if grudging) that people are only becoming more mobile,²³⁵ and that if the global order is to retain any semblance of the liberal values it professes, bigger, further-reaching walls are an untenable strategy.

V. CONCLUSION

The scale and pattern of involuntary migration in the last five years have made vivid the inadequacy of the global governance frameworks in place to address this migration. As backlash against involuntary migration has intensified—especially in Europe and North America—an emerging global anti-xenophobia framework (the Framework) is discernable and has gained new momentum. This Article is the first to identify this emerging Framework and has argued that the Framework's narrow focus on addressing individual acts and attitudes of xenophobic prejudice misses the role that international law, policy, and state action on migration seemingly play in making the problem of xenophobia worse. It posits specific "xenophobic anxiety ratchets," including in the global refugee regime, and proposes a new approach that places reform of the global governance of involuntary migration at the center of global cooperation to mitigate the problem of xenophobia.

234. Emma Graham-Harrison, *Migrants from west Africa being 'sold in Libyan slave markets'*, THE GUARDIAN (Apr. 10, 2017), <https://www.theguardian.com/world/2017/apr/10/libya-public-slave-auctions-un-migration> [<https://perma.cc/YMJ4-GDL2>] (archived Jan. 22, 2018); Press Release, International Organization for Migration, IOM Learns of 'Slave Market' Conditions Endangering Migrants in North Africa (Apr. 11, 2017), <https://www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa> [<https://perma.cc/Q4RJ-KT4Y>] (archived Jan. 22, 2018).

235. If the proportion of the global population that is international migrants remains constant, there will be 321 million international migrants by 2050.